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Supreme Court, U.S.
FILED

101342 APR 26 2011

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No.

In The
Supreme Court of the United States

JOSEPH R. AMEDSON,
Petitioner,

v.

WASHINGTON STATE BOARD OF PHARMACY;
WASHINGTON STATE DEPARTMENT OF HEALTH;
ADJUDICATIVE SERVICE UNIT; and
ARTHUR E. DeBUSSCHERE,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals, Division II,
Of The State Of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

INTRODUCTORY STATEMENT

Joseph Amedson was licensed as a pharmacist by the State of Washington in 1983. In June 2007 the State Board of Pharmacy filed a Statement of Charges against Amedson alleging unprofessional conduct and seeking to revoke his professional license. Under Washington law, a professional license disciplinary proceeding is a quasi-criminal action. Under the U.S. Constitution and this Court's decisions, quasi-criminal actions are entitled to the full protection of the Fifth Amendment's privilege against self-incrimination and the right to remain silent without adverse consequences. Amedson fully asserted his Fifth Amendment rights and privileges and was punished therefor by the imposition of evidentiary sanctions and adverse inferences. The Board revoked his professional license and the courts affirmed its Final Order, all directly contrary to the decisions of this Court and the U.S. Constitution.

QUESTIONS PRESENTED

1. Whether this Court's decisions in *Boyd v. United States*, 116 U.S. 616 (1886), *Spevack v. Klein*, 385 U.S. 511 (1967), and *In re Ruffalo*, 390 U.S. 544 (1968), are still the rule of law and the law of this land as to the Fifth Amendment's absolute privilege against self-incrimination and right to remain silent without adverse consequences in quasi-criminal actions?

2. Whether Amedson as the Defendant in a quasi-criminal professional license disciplinary action has the same Fifth Amendment protections as accorded a named Defendant in a criminal action; namely, a blanket privilege against self-incrimination and right to remain silent as to any type or form of compulsory oral interrogation by the prosecution, and in so doing suffer no adverse consequences?

3. Whether the Fifth, Sixth, and Fourteenth Amendments and this Court's decisions thereunder prohibit the imposition of any sanctions and/or disabilities whatsoever stemming from the Defendant's assertion of his privilege against self-incrimination and right to remain silent in a quasi-criminal action seeking to revoke his professional license?

4. Whether this Court's decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), relating to exhaustion of discretionary vis-à-vis mandatory agency reviews of final orders under the federal Administrative Procedure Act equally applies under the Fourteenth Amendment to the same issue raised under a State Administrative Procedure Act?

5. Whether the *fruit of the poisonous tree* doctrine applies under the Fifth Amendment to quasi-criminal professional license disciplinary actions to exclude evidence obtained in violation of a State's mini-*Miranda* statute, RCW 18.130.095(2)(a)?

LIST OF ALL PARTIES IN PROCEEDINGS BELOW

Petitioner

Joseph R. Amedson is an individual whose mailing address is 22522 S.E. 51st Street, Issaquah, Washington 98029.

Respondents

The Washington State Board of Pharmacy is a State Board established under RCW 18.64.001, and is located at 310 Israel Road, Tumwater, Washington 98501.

The Washington State Department of Health, c/o Mary Selecky, Secretary of Health, has its principal offices at 101 Israel Road S.E., Tumwater, Washington 98501.

The Adjudicative Service Unit is a unit of the Department of Health, and is located at 310 Israel Road, Tumwater, Washington 98501.

The Presiding Officer, Arthur E. DeBusschere, is a Health Law Judge in the staff of the Adjudicative Service Unit. Mr DeBusschere is a member of the Washington State Bar, #13804, and his mailing address is PO Box 252, East Olympia, Washington 98540.

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I. REPORTS OF OPINIONS AND ORDERS ENTERED BY COURTS AND ADMINISTRATIVE AGENCIES

Unpublished Opinion of the Washington State Court of Appeals, Division II, entered on August 17, 2010, is set forth verbatim in Appendix A, *infra*, at pp. 4a - 18a.

Order Denying Motion For Reconsideration of the Washington State Court of Appeals, Division II, entered on September 14, 2010, is set forth verbatim in Appendix B, *infra*, at pp. 19a - 20a.

Order [Denying Petition for Review] of the Washington State Supreme Court entered on February 2, 2011, is set forth verbatim in Appendix C, *infra*, at pp. 21a - 22a.

Order On Judicial Review of the Thurston County Superior Court entered on March 4, 2009, is set forth verbatim in Appendix D, *infra*, at pp. 23a - 27a.

Findings Of Fact, Conclusions Of Law And Final Order (Failure To Appear) of the State of Washington, Department of Health, Board of Pharmacy entered on April 26, 2008, is set forth verbatim in Appendix E, *infra*, at pp. 28a - 43a.

Prehearing Order No. 2: Order Denying Motion To Quash of the State of Washington, Department of Health, Board of Pharmacy entered on November 28, 2007, is set forth verbatim in Appendix F, *infra*, at pp. 44a - 57a.

Prehearing Order No. 4: Order Denying Motion For Reconsideration Of Prehearing Order No. 2 of the State of Washington, Department of Health, Board of

Pharmacy entered on December 21, 2007, is set forth verbatim in Appendix G, *infra*, at pp. 58a - 61a.

Prehearing Order No. 5: Order On Respondent's Motion To Suppress of the State of Washington, Department of Health, Board of Pharmacy entered on January 2, 2008, is set forth verbatim in Appendix H, *infra*, at pp. 62a - 73a.

Prehearing Order No. 6: Order On Department's Motion For Sanctions of the State of Washington, Department of Health, Board of Pharmacy entered on January 9, 2008, is set forth verbatim in Appendix I, *infra*, at pp. 74a - 81a.

Prehearing Order No. 7: Order Denying Respondent's Motion To Dismiss of the State of Washington, Department of Health, Board of Pharmacy entered on January 25, 2008, is set forth verbatim in Appendix J, *infra*, at pp. 82a - 94a.

Prehearing Order No. 8: Order Denying Respondent's Motion To Compel of the State of Washington, Department of Health, Board of Pharmacy entered on February 4, 2008, is set forth verbatim in Appendix K, *infra*, at pp. 95a - 101a.

Prehearing Order No. 9: Order Denying Motions For Reconsideration of the State of Washington, Department of Health, Board of Pharmacy entered on February 6, 2008, is set forth verbatim in Appendix L, *infra*, at pp. 102a - 106a.

Prehearing Order No. 10: Order On Motions And Order On Conduct At Hearing of the State of Washington, Department of Health, Board of Pharmacy entered on February 25, 2008, is set forth verbatim in Appendix M, *infra*, at pp. 107a - 123a.

II. STATEMENT OF THE BASIS FOR JURISDICTION OF THE SUPREME COURT

The highest State appellate court decision made and sought to be reviewed is the Unpublished Opinion of the Washington State Court of Appeals, Division II, entered on August 17, 2010.[1]

The Order Denying Motion For Reconsideration of the Washington State Court of Appeals, Division II, was entered on September 14, 2010.[2]

The Order [Denying Petition For Review] of the Washington State Supreme Court was entered on February 2, 2011.[3]

The jurisdiction of this Court is based on federal questions and grounded upon U.S. Const. Art. III, Section 2;[4] 28 U.S.C. Section 1257(a);[5] and Supreme Court Rule 13.1.

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[1] This Unpublished Opinion is set forth verbatim in Appendix A, *infra*, at pp. 4a - 18a.

[2] This Order is set forth verbatim in Appendix B, *infra*, at pp. 19a - 20a.

[3] This Order is set forth verbatim in Appendix C, *infra*, at pp. 21a - 22a.

[4] The full text of this Article is set forth verbatim in Appendix N, *infra*, at pp. 124a - 125a.

[5] The full text of this Code is set forth verbatim in Appendix N, *infra*, at pp. 128a - 129a.

III. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The constitutional provisions, statutes, and regulations primarily involved in the case are cited below, and the full text of the relevant parts thereof are set forth in Appendix N, *infra*:

U.S. Const. Amend. IV, V, VI, and XIV, Section 1.[6]

Washington State Statutes: RCW 18.130.095(2)(a); RCW 34.05.440(3); RCW 34.05.470(1); and RCW 34.05.534.[7]

Washington State Regulations: WAC 246-11-390(3); WAC 246-11-480(3); WAC 246-11-580; and WAC 246-11-610(1).[8]

Washington Court Rules: RAP 12.1.[9]

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[6] Full text of these provisions of the U.S. Constitution is set forth in Appendix N, *infra*, at pp. 125a - 128a.

[7] Full text of these provisions of the Revised Code of Washington (RCW) is set forth in Appendix N, *infra*, at pp. 129a - 135a.

[8] Full text of these provisions of the Washington Administrative Code (WAC) is set forth in Appendix N, *infra*, at pp. 135a - 141a.

[9] Full text of this Rule On Appeal (RAP) is set forth in Appendix N, *infra*, at p. 141a.

IV. STATEMENT OF THE CASE

FACTUAL BACKGROUND

Amedson was employed as a contract pharmacist at A-Z Pharmacy in Bellevue, Washington, at which he noticed certain irregularities that may have constituted violations of law. He brought his observations to the attention of the Washington Department of Social and Health Services (DSHS); from which he was noted as the first to come forward with such information and was granted anonymity due to his concerns for his safety. Amedson became concerned that DSHS was not proceeding with an inquiry into his complaint and subsequently contacted the State Board of Pharmacy. He met with two investigators from the Board in October 2004, one of whom was Stan Jeppesen. During the course of this first meeting with Board investigators, Jeppesen expressly told Amedson that (1) Amedson would remain anonymous, and (2) Amedson would be immune from any Board action for anything uncovered during their investigation.[10] Over the ensuing months Amedson fully cooperated with the ongoing federal and State

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[10] Amedson understood and believed that this meant he was protected and safe from any possible Board action, including any disciplinary proceedings, based on any of his acts or conduct in exchange for his continued assistance and cooperation in the A-Z Pharmacy investigation. Amedson has personal, first hand knowledge of this conversation and the express promise of immunity made to him. Relying in good faith on this oral grant of immunity, Amedson fully cooperated with State and federal investigators.

investigation of A-Z Pharmacy, as to which his immunity from federal prosecution was granted and expressly confirmed by HHS/OIG Special Agent J. Timothy Hinckley.[11]

Amedson fully cooperated with both the Board and the federal government in their joint investigation of the pharmacy.[12] During the course of their investigation, documents with which Amedson provided the investigators with assistance in reviewing led to discovery of alleged unlawful coupon redemptions with which Amedson was purportedly involved.[13] Jeppesen informed the Board as to such discovery and the Board approved a secret investigation of Amed-

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[11] The HHS/OIG is the federal Health and Human Services agency's Office of Inspector General. In exchange for his continued cooperation in the A-Z Pharmacy investigation, J. Timothy Hinckley, as HHS/OIG Special Agent, expressly orally promised Amedson that he would be immune from federal prosecution for any matter in which he may have been involved that may be discovered and subsequently orally affirmed such grant to Amedson's counsel. However, several attempts by Amedson to obtain a written statement from or deposition testimony from Hinckley have been summarily rebuffed by the federal government citing HHS' *Touhy* regulations. 45 CFR § 2.4(a), *et seq*. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Notwithstanding the assertion of the *Touhy* bar to Amedson, Hinckley gave a written statement to the State AAG denying any grant of immunity that was subsequently used against Amedson, over objection, in the rejection of his motion to dismiss the Board's Statement of Charges.

[12] Ultimately leading to the successful federal prosecution and incarceration of certain individuals at A-Z Pharmacy. *United States v. Alexander Milman, et al.*, CR06-245JLR (W.D.Wash. 2006).

[13] Amedson provided many of these documents to investigators and explained what they were in relation to the A-Z investigation.

son's possible involvement. Without expressly and in writing informing Amedson that he was personally under investigation and that he might be subject to Board disciplinary action, contrary to Washington's mini-*Miranda* written disclosure requirements, RCW 18.130.095(2)(a), and also specifically contrary to the promised immunity from Board action, Jeppesen obtained a lengthy written statement from Amedson detailing his alleged involvement with the coupon redemptions. However, the only subject matter as expressly noted in **bold lettering** on the face of this "Statement" was the following heading on Page 1:

> I, Joseph Raise Amedson, R.Ph., make the following statement to Stan Jeppesen, Investigator, an authorized representative of the Washington State Department of Health, Board of Pharmacy, and Special Agent Tim Hinckley, Health and Human Services, **regarding AZ Pharmacy and business practices**.

Bold in original. In good faith and not being otherwise advised, Amedson believed and understood that this pre-typed "Statement" was nothing more than a mere formality as part of his ongoing assistance and cooperation in the A-Z Pharmacy case.[14] Amedson

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[14] Absolutely nothing was said to Amedson by either Jeppesen or Hinckley that by signing such pre-typed prepared "Statement" that Amedson was in some manner waiving, relinquishing, or renouncing his immunity from Board action as to any of his personal acts and conduct discovered as part of the A-Z Pharmacy (continued...)

did exactly as he was told to do by Jeppesen and Hinckley, totally unaware that this "Statement" was in fact part of a special investigation conducted by the Board targeting Amedson personally and that such "Statement" would subsequently be used by the Department against Amedson in the quasi-criminal professional license disciplinary action as his alleged "confession".[15] All evidence of whatever form provided by Amedson was done involuntarily under promise of immunity from both the State Board and federal government. Based on this information and contrary to the promised immunity, the Board issued a Statement of Charges against Amedson which the Department of Health, by its Assistant Attorney General (AAG), prosecuted.

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[14](...continued)
investigation and case; and such was absolutely not his intent. At this meeting with the two official investigators present, Amedson believed that he was required to sign each page of the "Statement" as prepared and presented to him and in all places he was expressly told to do so as specifically instructed by the investigators.

[15] Had Amedson been made aware of such material facts he never would have signed the "Statement" and would have obtained counsel and asserted his constitutional rights and privileges as was his entitlement. This "Statement" is not the product of Amedson's knowing, intelligent, and voluntary free will. What the "Statement" is in fact is the product of Amedson's free will and trust being overborne, abused and misused by the force and presence of the State and federal investigators, Jeppesen and Hinckley, and the constant requirement for Amedson to fully assist and cooperate with them in the A-Z Pharmacy investigation in exchange for his express immunity from Board disciplinary action and federal prosecution.

PROCEDURAL BACKGROUND

In light of the foregoing background and upon the Board breaching its promised immunity by issuance of its Statement of Charges, Amedson asserted his Fifth Amendment absolute right to remain silent and privilege against self-incrimination independently and separately arising in the quasi-criminal professional license disciplinary action against him.[16]

Amedson's Assertion Of Constitutional Rights In The Board Quasi-Criminal Action

It was within this context that Amedson, under protest and protection of his constitutional rights, answered the Board's Statement of Charges and asserted his Fifth Amendment right to remain silent and privilege against self-incrimination in the following manner:

NON-WAIVER OR RELINQUISHMENT OF CONSTITUTIONAL RIGHTS

Although a professional license disciplinary proceeding in the State of Washington is in the nature of a civil action, it

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[16] The assertion of his Fifth Amendment rights in the Board's quasi-criminal action against him might have jeopardized his federal immunity but for the fortuitous plea entered by the defendants in the federal criminal case and the avoidance of a trial. This was a risk that Amedson was forced to take due to the Board's breach of its promise and the necessary assertion of his Fifth Amendment rights in the State quasi-criminal action against him.

> is nevertheless sufficiently punitive in sanctions to be characterized as quasi-criminal thereby according [Amedson] constitutional rights and privileges under and pursuant to U.S. Const. Amend. V . . . . However, under statute and administrative rule [Amedson] is patently coerced to respond to the Board's Statement of Charges under threat of sanctions by default should the Board's Statement of Charges in this matter go unanswered. RCW 34.05.440 (1) . . . . Such a direct and forced contravention of the Fifth Amendment right to remain silent has been found to be unconstitutional. In light of these compelling issues, and without intending to in any way waive, diminish or relinquish any of his constitutional rights and privileges, Amedson reasonably responds to the Board's Statement of Charges . . . .

Amedson's First Amended Answer to Board's Statement of Charges, at p. 1.[17]

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[17] "Amedson invokes all of his constitutional rights and privileges in this disciplinary proceeding, including and not limited to his absolute right to remain silent at all stages and phases of this proceeding, and not be subject to subpoenas or other such prohibited interrogations, including and not limited to being called and compelled to testify as an adverse witness by the prosecution at the hearing." First Amended Answer, Affirmative Defense ¶E,

(continued...)

In furtherance thereof, Amedson promptly filed a series of prehearing motions all of which are included within the scope of and essential to judicial review pursuant to WAC 246-11-390(12);[18] including motions to dismiss, to suppress certain documentary and oral statements as fruits of the poisonous tree, and to quash the Notice of Deposition issued by the Department to Amedson.[19] It was also within this context that the Department filed its motion for sanctions against Amedson for asserting his constitutional rights and privileges and declining to honor the Department's Notice and be compelled to submit to an oral deposition by the Prosecuting AAG in the quasi-criminal action against him.[20] Amedson's consistent assertion of his Fifth Amendment rights and the manner in which such was passed on by the Board's Presiding Officer are well-illustrated in the following excerpt from Prehearing Order (PHO) No. 9:

> In his motion for reconsideration, [Amedson] argued that the Presiding Officer misapplied the holding in *King v. Olympic Pipeline Co.*, 104 Wn. App. 338 (2002)

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[17](...continued)
at p. 6.

[18] Appendix N, *infra*, at p. 137a.

[19] A complete list of all 19 prehearing motions and other papers/pleadings filed by Amedson is set forth in Appendix P, *infra*, at pp. 176a - 179a.

[20] Appendix I, *infra*, at pp. 74a - 81a.

> to this proceeding. The Presiding Officer has already addressed this issue in prior orders in this proceeding, and there is no new basis for reconsideration. In this unique disciplinary proceeding, the label of "quasi-criminal" means that [Amedson] is entitled to due process, including a heightened standard of proof, but not every procedural protection afforded to criminal defendants. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534, 525, 528-529, *cert. denied*, 535 U.S. 904 (2002); *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466,474-476 (1983); *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11 (1958). [Amedson's] motion for reconsideration of Prehearing Order No. 6 should be denied.

Appendix L, *infra*, at p. 104a (underlining added). This line of reasoning also underscores the Presiding Officers unswerving erroneous conviction that Amedson's Fifth Amendment rights were merely derivative and did not arise independently and separately stemming solely from the Board's quasi-criminal action. *See, e.g.*, Appendix F, *infra*, at pp. 52a - 55a.[21] Amed-

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[21] The Presiding Officer constantly and wrongly commingled the Board's quasi-criminal action with the then ongoing federal criminal prosecution in the A-Z Pharmacy case to come to the erroneous conclusion that Amedson's Fifth Amendment claim of absolute right and privilege derived from the federal action and not, as they clearly and legally did, arise solely from the State

(continued...)

son made one final attempt to dissuade the Presiding Officer from his predisposition to equate Amedson's Fifth Amendment rights in a quasi-criminal action to the limited extent such are available in a purely civil matter, but again to no avail:

> Here, it is critically important and fundamentally dispositive that Amedson is not but a mere witness, he is **the DEFENDANT** in this quasi-criminal action and thus has the full and blanket protections, rights and privileges afforded such individuals under the Fifth Amendment . . . .

Appendix O, *infra*, at p. 155a (bold in original).[22]

In light of this extensive background of prehearing motions, the Presiding Officer made certain

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[21](...continued)
quasi-criminal action to revoke his professional license. Amedson tried numerous times to correct this patently erroneous misconception in his motions and requests for reconsideration, but all to no avail as such derivative connection was a means to an end; namely, to deprive Amedson of his Fifth Amendment rights. *See, e.g.*, Appendix Q, *infra*, at p. 192a (motion for reconsideration).

[22] As authority, Amedson cited (as he had in each prehearing motion previously made) *Boyd v. United States*, 116 U.S. 616 (1886); *Spevack v. Klein*, 385 U.S. 511 (1967); *State ex rel. Vining v. Florida Real Estate Commission*, 281 So.2d 487 (Fla. 1973); *State Bar of Michigan v. Woll*, 194 N.W.2d 835 (Mich. 1972); and *City of Philadelphia v. Kenny*, 369 A.2d 1343, 28 Pa. Commw. 531, 539 (Pa. Commw. Ct. 1977). *Cf. State v. Lougin*, 50 Wn. App. 376, 381, 749 P.2d 173 (1988) (privilege applies to all stages of the case). Appendix O, *infra*, at p. 156a, fn11.

decisions and issued Prehearing Orders that molded and cast in concrete the framework within which the hearing was to be conducted and in which Amedson would be severely hamstrung and prejudiced in any presentation of his defense, including:

1. Although the Presiding Officer *correctly* found and concluded that (a) "Washington courts have continued to hold that a disciplinary proceeding is quasi criminal in nature";[23] and (b) "Washington law acknowledges that the Fifth Amendment privilege against self-incrimination applies to a quasi-criminal proceeding,"[24] and further found and concluded that the issue of immunity for Amedson presented a genuine issue of material fact for the Board to decide at and from the hearing;[25] the Presiding Officer *erroneously* concluded that the scope of one's Fifth Amendment privilege against self-incrimination and right to remain silent in a **quasi-criminal** action was coextensive only with the application of such right and privilege as is available in a purely civil lawsuit context, erroneously citing as authority *King v. Olympic Pipe*

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[23] Appendix F, *infra*, at p. 52a, ¶ 2.9.

[24] Appendix F, *infra*, at p. 51a, ¶ 2.7.

[25] Appendix J, *infra*, at pp. 88a - 89a, ¶ 3.6.

Line Company, 104 Wn. App. 338, 16 P.3d 45 (2000) (a civil action for monetary damages).[26]

2. On the *erroneous* legal basis that Amedson's Fifth Amendment rights as the Defendant in a quasi-criminal action against him were limited as applied to the parties in a civil action for damages, the Presiding Officer denied Amedson's motion to quash the Department's Notice of Deposition.[27]

3. The Presiding Officer *erroneously* found and concluded that Amedson's continued assertion of his Fifth Amendment rights and refusal to submit to compulsory interrogation by oral deposition constituted "a willful interference with the progress of this proceeding"[28] and thus was subject to sanctions.[29]

4. The Presiding Officer *erroneously* found and concluded that Amedson could be compelled to be called and testify in the Department's case-in-chief at the hearing and "that the Board shall be entitled to

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[26] Appendix F, *infra*, at p. 51a, ¶ 2.6.

[27] Appendix F, *infra*, at pp. 44a - 57a.

[28] Appendix I, *infra*, at p. 79a, ¶ 3.7. The term "willful interference" is, however, nowhere defined in either the Board's or Department's regulations.

[29] Appendix I, *infra*, at pp. 74a - 81a.

draw an adverse inference when [Amedson] refuses to answer a question on the grounds that it might incriminate him."[30]

5. The Presiding Officer sanctioned Amedson by (a) on the one hand Ordering that at the hearing "[Amedson] has the burden to prove the affirmative defense that an oral immunity agreement was granted to him by the Board of Pharmacy,"[31] while (b) on the other hand, Ordering that "[Amedson] shall not be allowed to testify on his behalf in order to present evidence . . . regarding his claims of immunity or testimony regarding alleged illegally obtained information and evidence" (given under promised immunity and involuntarily).[32]

Based on these prehearing rulings made by the Presiding Officer, and the conclusiveness of Prehearing Order No. 10: Order On Motions And Order On Conduct At Hearing,[33] Amedson gave the Board

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[30] Appendix M, *infra*, at p. 116a, ¶ 3.13.

[31] Appendix M, *infra*, at p. 114a, ¶ 3.3.

[32] Appendix M, *infra*, at pp. 115a - 116a, ¶ 3.10.

[33] PHO No. 10 (Appendix M, *infra*, at pp. 107a - 123a) concretely set and established the rules for the hearing as to which Amedson would be compelled to strictly follow. WAC 246-11-390(3). Appendix N, *infra*, at p. 135a. In light of the severe and unconstitutional sanctions Ordered against him, Amedson's constitutional rights were decimated and the hearing would be, (continued...)

written notice that he would respectfully decline to attend the hearing unless the imposed sanctions against him were removed.[34] Amedson's objection to PHO No. 10 also raised violations of U.S. Const. Amend. VI (unfettered right of Defendant to present his case in manner he deems appropriate and necessary) and XIV (due process includes all Fifth Amendment protections in defense of quasi-criminal action).[35] The Presiding Officer never responded to Amedson's objections to PHO No. 10 and did not alter any of the imposed sanctions; Amedson did not attend the hearing instead relying on the record of the prehearing motions and decisions as to the severe unconstitutional and prejudicial sanctions imposed against him; and the Board entered a Final Order[36] revoking Amedson's Pharmacist license.[37]

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[33](...continued)
and was, but a sham.

[34] Appendix O, *infra*, at pp. 167a - 169a.

[35] Appendix O, *infra*, at pp. 150a - 161a.

[36] The Board conducted a hearing *in absentia* and issued its Final Order with the notation "Failure to Appear". Appendix E, *infra*, at p. 28a.

[37] Washington has long viewed the revocation of a professional license as an administrative death sentence. "[R]evocation of a [professional] license is much like the death penalty in criminal law -- it is not imposed to reform the particular person involved." *In re Revocation of the License to Practice Dentistry of Flynn*, 52 Wn.2d 589, 596, 328 P.2d 150 (1958).

JUDICIAL REVIEW OF BOARD'S FINAL ORDER

Within the prescribed time limits for seeking judicial review of an administrative final order, Amedson filed a Petition For Judicial Review in Thurston County Superior Court.[38] The Petition identified the specific grounds, including numerous violations of constitutional rights in the Prehearing Orders and Final Order, on which Amedson sought to have the Superior Court overturn the Board's Final Order.[39] Following the parties' briefing and oral arguments, the Superior Court entered its Order affirming the Board's Final Order in all respects. Regarding Amedson's assertions of his Fifth Amendment rights and the exclusion of certain evidence as fruit of the poisonous tree, the Superior Court disposed of such in the following manner:

> In this case Department of Health law judge issued a pre-hearing Order 10, which sanctioned the respondent for not appearing at two depositions and therefore the respondent was precluded from asserting his right against self incrimination at the disciplinary hearing and pre-

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[38] Appendix P, *infra*, at p. 170a.

[39] Appendix P, *infra*, at pp. 182a - 187a.

cluding a claim of immunity or testimony regarding illegally obtained information because the Department was prevented from conducting discovery.

The Presiding Officer ruled that the Board may be allowed to draw "adverse inferences" of the Respondent refuses to answer a question on the ground it might incriminate him.

This Court upholds the disciplinary board's right to issue the pre-hearing Order 10 and to require the Defendant to appear and give testimony or be penalized. The penalties imposed by the Presiding Officer were appropriate.

This is a civil case and although he may assert his right to remain silent and not to testify against himself, this may be used against him in a civil case.

This Court finds the oral and written statement given to Department Investigator Jeppesen and McLean were properly admitted and based on the record the Court agrees with the Department of Health Law Judge that there was no oral immunity agreement between the Petitioner and the Department of Health investigators.

Appendix D, *infra*, at p. 26a.

Following issuance of the Superior Court's Order affirming in all respects the Board's Final Order revoking his professional license, Amedson appealed

as a matter of right to the Washington State Court of Appeals, Division II, again expressly raising the constitutional issues and the violation of his rights raised and rejected so many times below. The Court of Appeals affirmed the Board's Final Order and summarily rebuffed Amedson's constitutional arguments by concluding, *sua sponte*, that Amedson had not exhausted all administrative remedies before the Board and was thus not legally entitled to seek judicial review in any way, shape or form.

> As an agency, the Board had authority to enter a default judgment against Amedson for failing to attend or participate in the hearing. RCW 34.05.440(2);[40] WAC 246-11-280(3);[41] *Graves v. Dep't of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). Once a default judgment was entered, Amedson was required to file a motion to vacate the de-

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[40] RCW 34.05.440(2) provides:
If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

[41] WAC 246-11-280(3) provides:
If a party requests an adjudicative proceeding but fails to appear at the hearing, the presiding officer may issue an order of default in the same manner as subsection (2) of this section, or may proceed to hear the matter in the absence of the party and issue a final order.

> fault order within seven days after service of the default order. RCW 34.05.440 (3). Filing means actual receipt of the motion to vacate by the Adjudicative Service Unit in Olympia, Washington. [citation omitted].
>
> Here, Amedson not only failed to appear at the hearing but he also failed to file a motion to vacate the default judgment within seven days. There is no evidence that Amedson filed any a motion to vacate the default judgment. Therefore, he has waived his right to argue that the Department's default judgment was invalid. The APA requires a petitioner to exhaust all administrative remedies before judicial review is appropriate. RCW 34.05.534.[42] Accordingly, we will not disturb the Board's default judgment against Amedson.

Appendix A, *infra*, at pp. 13a - 14a (footnotes in original). And as for the substantial constitutional issues and patent violations of Amedson's Fifth and Sixth Amendment rights, the Court of Appeals summarily disposed of such in the following manner:

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[42] Amedson makes no attempt to argue that he should be relieved from the requirement to exhaust administrative remedies because those remedies would be patently inadequate or futile, or that grave irreparable harm would result from having to exhaust the administrative remedies available to him. *See* RCW 34.05.534(3).

> Amedson raises several constitutional issues. The crux of his appeal is based on the premise that he was entitled to the constitutional privilege against compulsory self-incrimination equivalent to that of a criminal defendant under the Fifth Amendment to the United States Constitution . . . . He further contends that the Board denied him an opportunity to present a defense under the Sixth Amendment to the United States Constitution. We decline to reach the merits of Amedson's remaining issues. By refusing to participate in the hearing, Amedson failed to exhaust his administrative remedies. *See* RCW 34.05.534. *See, e.g., Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 936, 808 P.2d 1155 (1991) (plaintiffs were not entitled to review by appellate court because they failed to exhaust their remedies when they refused to attend the equivalent of an administrative hearing).

Appendix A, *infra*, at p. 16a.

As the exhaustion of administrative remedies was raised *sua sponte* by the Court of Appeals, never before in the Board proceeding or in Superior Court by the State, and accordingly had never been briefed as to its applicability, or obvious inapplicability, but was the basis for the Court's decision to not reach or even consider the merits of Amedson's constitutional issues, Amedson promptly filed a Motion for Reconsideration

with the Court of Appeals. The Court of Appeals denied Amedson's motion without comment and its decision stood.[43]

In the court of last resort at the State level, Amedson timely filed a Petition for Review in the Washington State Supreme Court. The State Supreme Court denied Amedson's Petition for Review without comment bringing State judicial review to a conclusion on February 2, 2011.[44]

V. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Court should allow Amedson's Petition For A Writ Of Certiorari because a State administrative agency and the State courts have decided an important federal question with respect to the application of the Fifth Amendment's right of the Defendant in a quasi-criminal action to remain silent and privilege against self-incrimination without adverse consequences in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(c). Moreover, State courts have now mandated exhaustion of *optional* administrative reviews following entry of a final order that also conflicts with relevant decisions of this Court. Rule 10(c).

Amedson's constitutional rights and privileges under and pursuant to U.S. Const. Amend. IV, V, VI and XIV were patently ignored and violated, all to his

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[43] Appendix B, *infra*, at p. 19a.

[44] Appendix C, *infra*, at p. 21a.

severe prejudice and disadvantage, at all levels of review in this quasi-criminal action against him and his professional license, starting with the Board of Pharmacy and ending thus far with the Washington State Court of Appeals.

A. The Sanctions Imposed Against Amedson In The Adjudication To Revoke His License Conflict With This Court's Decision Firmly Standing For Over 125 Years, And Its Progeny, That U.S. Const. Amend. V Rights And Privileges Fully Apply To Defendants In Quasi-Criminal Actions

There is no doubt, uncertainty or debate that under long standing, well-established Washington law a professional license revocation proceeding is a quasi-criminal action. *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983);[45] and as observed by the Washington Supreme Court "[a professional license revocation proceeding's] consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose." *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11, 319 P.2d 824 (1958). And as recently confirmed by the Washington Supreme Court to cast aside any doubt as to the quasi-criminal nature of professional license

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[45] Citing *In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney disbarment); *In re Kindschi*, 52 Wn.2d 8, 11-12, 319 P.2d 824 (1958) (physician discipline). *See also Clausing v. State*, 90 Wn. App. 863, 874, 955 P.2d 394 (1998).

disciplinary actions, "*Johnston* and *Kindschi* are unquestionably the law of this jurisdiction."[46]

That professional license revocation proceedings are quasi-criminal actions, Washington law *accords* with this Court's decisions. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney disciplinary actions "are adversary proceedings of a quasi-criminal nature"). And as a direct result, the Defendant in a quasi-criminal action is entitled to the full protection of the Fifth Amendment's right to remain silent and privilege against self-incrimination without adverse consequence:

> [Q]uasi-criminal [actions] are within the reason of criminal proceedings for all the purposes of . . . that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself . . . .

Boyd v. United States, 116 U.S. 616, 634-35 (1886), and its progeny over the years, including *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (the Fifth Amendment secures an individual's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence"). Other State courts also recognizing professional license disciplinary proceedings as quasi-criminal actions further flesh out the broad and uncompromising scope of the Fifth Amendment protections accorded the Defendant therein:

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[46] *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 528, 29 P.3d 689 (2001).

> [T]he right to remain silent applies not only to the traditional criminal case, but also to proceedings "penal" in nature [i.e., quasi-criminal] in that they tend to degrade the individual's professional standing, professional reputation or livelihood.

State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487, 491 (Fla. 1973); and

> [In a] quasi-criminal proceeding . . .; that the privilege against self-incrimination does apply to such a proceeding . . .; and that comments made to a fact-finding body by a prosecutor concerning an accused's silence, are prohibited by the self-incrimination clause of the US Const, Am V . . . .

State Bar of Michigan v. Woll, 194 N.W.2d 835, 838 (Mich. 1972); and finally

> [In] quasi-criminal cases, the Fifth Amendment privilege is fully applicable; the defendant may refuse to testify altogether and no adverse inference may be drawn from such refusal.

City of Philadelphia v. Kenny, 369 A.2d 1343, 1348-49 (Pa.Commw.Ct. 1977)(*citing Boyd*; *United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *Lees v. United States*, 150 U.S. 476 (1893), and others).

Cf. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988) (Fifth Amendment privilege applies to all stages of the case).

All of the foregoing were time and again brought and highlighted before the Board's Presiding Officer and the State courts in the ensuing judicial review of the Board's Final Order of revocation; and all equally to no avail and in direct conflict with this Court's long standing relevant decisions regarding the applicability of U.S. Const. Amend. V to quasi-criminal actions. And in order to come to a determination in direct conflict with this Court's relevant decisions, the Board's Presiding Officer, as well as the reviewing State courts, had to necessarily ignore the clear mandate of the Board's own controlling regulations; namely, that in considering an issue of law the Presiding Officer is to "resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules, and court decisions." WAC 246-11-480(3)(b).[47] The Presiding Officer followed by State courts ignoring U.S. Const. Amend. V and this Court's decisions in its full applicability to quasi-criminal actions most certainly does not constitute "resolv[ing] the issue on the basis of the best legal authority and reasoning available".

There are substantial and just reasons for this Court to allow Amedson's Petition For A Writ Of Certiorari to affirm its decisions regarding the Fifth Amendment's full applicability to quasi-criminal actions.

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[47] Appendix N, *infra*, at p. 139a.

B. The Court Of Appeals' *Sua Sponte* Holding That In A Quasi-Criminal Action It Is Now Mandatory For The Defendant To File An Optional Motion To Vacate The Board's Final Order Conflicts With This Court's *Darby* Decision And Violates Amedson's Due Process Rights

The second reason for this Court to allow Amedson's Petition For A Writ Of Certiorari is that the Court of Appeals' *sua sponte* holding in this quasi-criminal action that it was **mandatory** for Amedson to file what is clearly under statutes and regulations an **optional** motion to vacate the Board's Final Order conflicts with this Court's *Darby*[48] decision and violates Amedson's Fourteenth Amendment due process rights.[49] Supreme Court Rule 10(c).

The Court of Appeals *sua sponte* raised the issue of exhaustion of administrative remedies and side-stepped all of Amedson's constitutional issues. The Court of Appeals held that in a quasi-criminal action it is now *mandatory* to file an *optional* motion to vacate the Board's Final Order because such was entered *in absentia* and was thus in its view a default

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[48] *Darby v. Cisneros*, 509 U.S. 137 (1993).

[49] Appendix N, *infra*, at p. 126a - 127a (Section 1). Washington courts have long held that a professional license is a very valuable property right accorded an individual by the State and subject to constitutional protections to prevent erroneous deprivation as well as to preserve to the licensee his/her livelihood and reputation. *See, e.g., Nguyen*, 144 Wn.2d at 522-23.

Order, notwithstanding and totally ignoring the extensive Prehearing Motions and Orders that render the Final Order anything but a typical default.[50] Exhaustion in this context was **never** raised or briefed by the parties;[51] **not** pleaded as an affirmative defense and thus waived by the State;[52] and in any event is **not** required as any such effort would be a futile, vain and useless act[53] because, *inter alia*, such motion would be

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[50] Appendix A, *infra*, at p. 13a. *See also* Appendix N, *infra*, at pp. 132a - 135a, 139a - 141a (defaults, exhaustion, and motions to vacate). Moreover, Amedson was very clear to identify and make all the Prehearing Orders an essential part of the record and the focus of judicial review. WAC 246-11-390(12) (record for judicial review); Appendix N, *infra*, at p. 137a; Appendix P, *infra*, at p. 176a (Petition for Judicial Review very clearly and expressly set out each prehearing motion and Order as the record for review).

[51] Amedson was the only party to earlier raise exhaustion but in the context that the Presiding Officer was precluded from ordering sanctions against Amedson where the State had failed to seek judicial enforcement of its subpoena for a deposition. Appendix O, *infra*, at pp.154a - 155a, fn8. However, the Presiding Officer ignored the State's duty to exhaust its remedies and imposed severe and unconstitutional sanctions on Amedson.

[52] As an affirmative defense, the DOH/Board did not plead exhaustion; and thus such defense has been waived. *See, e.g., Schneider v. Snyder's Foods, Inc.*, 95 Wn. App. 399, 401, 976 P.2d 134 (1999) (exhaustion of administrative remedies is an affirmative defense); *Henderson v. Tyrrell*, 80 Wn. App. 592, 624, 910 P.2d 522 (1996) (affirmative defenses are waived unless affirmatively pled).

[53] *Orion Corporation v. State*, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985). In addition, exhaustion does not apply where the issues presented for review are constitutional, as "it is [the judicial] branch of our system of government that is the final arbiter

(continued...)

submitted for consideration by the very same Presiding Officer who denied each and every constitutional and statutory ground upon which any such motion to vacate would be based and who had already summarily ruled on and rejected them in the Prehearing Orders, culminating in PHO No. 10.[54] RCW 34.05.440(3); WAC 246-11-610(1) and -610(2).[55] It is also most ironic and a clear violation of Fourteenth Amendment due process that the Court of Appeals refused to call for briefing on this issue,[56] undoubtedly considering RAP

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[53](...continued)
of [the] constitution." *Carter v. University of Washington*, 85 Wn.2d 391, 399, 536 P.2d 618 (1975). *See also* RCW 34.05.534(3).

[54] PHO No. 10 amply demonstrates that any optional request to vacate would have been futile and a total waste of time, as such motion would be considered by the same Presiding Officer who made each and every Prehearing Order denying each and every one of Amedson's motions raising his constitutional rights and privileges; thus negating any possible requirement to exhaust such a remedy. *See, e.g.*, Appendix M, *infra*, at p. 110a - 112a (Prehearing Motions).

[55] Appendix N, *infra*, at pp. 132a - 133a, 141a.

[56] *See, e.g., State v. Curry*, 931 P.2d 1133, 1136-37 (Ariz. App. 1996) (deciding issue raised *sua sponte* without benefit of supplemental briefing runs counter to notions of procedural due process); *English v. Cowell*, 10 F.3d 434, 437 (7th Cir. 1993) (since the opportunity to respond is deeply embedded in our concept of fair play and substantial justice, making a ruling *sua sponte* without notice or an opportunity to respond violates the due process rights of the adverse party). If an appellate court considers an issue proper to decide a case, but such issue was never raised or briefed by any party, the court should notify the parties and give them an opportunity to present written argument on such

(continued...)

12.1(b)[57] absolutely discretionary unto itself while at the same time ruling Amedson's failure to file an optional motion was mandatory and fatal to his appeal and the review of substantial violations of his constitutional rights and privileges held inviolate by this Court's decisions.

Moreover, the Court of Appeals holding that filing an optional motion is nevertheless mandatory under the State Administrative Procedure Act (APA) has been soundly rejected under the comparable federal APA by this Court in *Darby v. Cisneros*, 509 U.S. 137 (1993). Whether one must exhaust all *optional* administrative remedies under the federal APA as a prerequisite to seeking judicial review was soundly rejected by this Court, holding that continued agency review of its decision "is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires [further agency action] before review and the administrative action is made inoperative pending that review." *Darby*, 509 U.S. at 154 (italics in original). The fundamental reason is clearly embedded in due process as an internal review mechanism that is clearly optional under the APA transformed into a mandatory prerequisite by the courts presents "a trap for unwary

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[56](...continued)
issue. *See* RAP 12.1(b) (Appendix N, *infra*, at p. 141a.); *Obert v. Environmental Research & Development Corporation*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989).

[57] Appendix N, *infra*, at p. 141a.

litigants." *Darby*, 509 U.S. at 147.[58]

In our case, under both statute, RCW 34.05.440,[59] and agency rule, WAC 246-11-610(1),[60] the filing of a motion to vacate a default order is clearly *optional* as each provision expressly states that the party against whom such default was entered "may" file a motion to have the default vacated.[61] Such motion would be sent to the Presiding Officer for consideration; it is left to the discretion of the Presiding Officer whether or not to grant such motion; and there is absolutely no provision to stay the effect of a default entered as a final order otherwise subject to direct judicial review. RCW 34.05.440(3); WAC 246-11-610(1) and -610(2). *See also* Appendix E, *infra*, at p. 29a ("the Board issues this final order"); Appendix E, *infra*, at p. 43a ("A petition for judicial review must be filed and served within 30 days after service of this Order"); Appendix E, *infra*, at p. 43a ("The Order remains in effect even if a petition for reconsideration or petition for review is filed"). *Note especially that* the

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[58] *See Oxy USA, Inc. v. Federal Energy Regulatory Commission*, 64 F.3d 679, 692 (D.C. Cir. 1995) (comparing statutes that expressly mandate a request for rehearing as a prerequisite to judicial review with those that make such administrative remedy optional).

[59] Appendix N, *infra*, at pp. 132a - 133a.

[60] Appendix N, *infra*, at p. 141a.

[61] "Nothing persuades us that the 'may' means must . . . to make it a prerequisite to the judicial review specifically provided by Congress." *Darby*, 509 U.S. at 150 (in reference to whether an application for rehearing was mandatory for exhaustion prior to judicial review).

Board's Final Order in the special notices supplemental section titled "Order of Default," Appendix E, *infra*, at pp. 41a - 42a, does **not** state that filing a motion to vacate a Default Order is mandatory or that failure to do so is fatal. Moreover, the Board denoted its decision as "FINDINGS OF FACT, CONCLUSIONS OF LAW AND **FINAL ORDER** (Failure to Appear)". Appendix E, *infra*, at p. 28a (bold added). Thus, the Board's Final Order is not subject to any further mandatory administrative remedies prior to judicial review.

> In no case may appeal to 'superior agency authority' be required by rule unless the administrative decision meanwhile is inoperative, because otherwise the effect of such a requirement would be to subject the party to the agency action and to repetitious administrative process without recourse. There is a fundamental inconsistency in requiring a person to continue 'exhausting' administrative processes after administrative action has become, and while it remains, effective. . . . Agency action which is finally operative and decisive is reviewable [by the courts].

Darby, 509 U.S. at 148.[62]

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[62] And *in accord* with this principle of law as applied to default judgments is our State Supreme Court's long-standing decision in *Graham v. Yakima Stock Brokers, Inc.*, 192 Wash. 121, 125, 72 P.2d 1041 (1937), in which the Court succinctly observed that (continued...)

In sum, the Court of Appeals' *sua sponte* judicial pronouncement that it is now required of the Defendant as a prerequisite to judicial review in a quasi-criminal action to exhaust all *optional* administrative remedies under the State APA conflicts with this Court's relevant and dispositive decision in *Darby* and moreover violates due process under all the circumstances. Under *Darby* such is a "trap" and should not be and is not the law. The Court is respectfully asked to allow Amedson's Petition For A Writ of Certiorari and correct this manifest injustice.

C. This Court Should Settle The Question Whether Under The Fifth Amendment The Fruit Of The Poisonous Tree Exclusionary Rule Is Extended To Quasi-Criminal Actions

The third reason for this Court to allow the Writ is to settle the question whether under the Fifth Amendment the *fruit of the poisonous tree* exclusionary rule is extended to professional license revocation quasi-criminal actions? Supreme Court Rule 10(c).

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[62](...continued)
"[u]nder the established rule in this jurisdiction, an appeal lies from [a] default judgment [because] while the judgment was by default, it is a final one, from which an appeal lies as from any other final judgment." The right to direct appeal in lieu of seeking CR 60(b) review is affirmed in *C. Rhyne & Associates v. Swanson*, 41 Wn. App. 323, 325, 704 P.2d 164 (1985) (where the Court of Appeals noted that "appeal from a denial of a CR 60(b) motion [to vacate a default] is not a substitute for appeal from the judgment" itself because an appeal from the denial of a CR 60(b) motion to vacate is subject only to "review . . . for an abuse of discretion"). *Query*: Is a motion to vacate but another trap for the unwary?

Amedson sought several times to either have the Board Statement of Charges dismissed outright or, at a minimum, exclude certain evidence from consideration as *fruit of the poisonous tree* because such was tainted by the promise of, and then breach of such promised, immunity from Board action;[63] moreover, Amedson's Written Statement was obtained in violation of the full written disclosure requirements of the State mini-*Miranda* law, RCW 18.130.095(2)(a), thus further vitiating the voluntariness of any purported confession.[64] The Presiding Officer neither dismissed the Charges nor suppressed the use of that evidence from Amedson obtained by his forced cooperation in lieu of invoking his Fifth Amendment rights, ultimately using such involuntary statements against him *in absentia* at the hearing to revoke his professional license.[65]

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[63] Appendix H, *infra*, at p. 62a (motion to suppress); Appendix J, *infra*, at p. 82a (motion to dismiss); Appendix K, *infra*, at p. 95a (motion to compel).

[64] Appendix N, *infra*, at p. 131a. A voluntary confession is the product of a rational intellect and free will, and considering the totality of the circumstances it must not be obtained by any promises or misrepresentations nor by the exertion of any improper influence that would overbear the Defendant's free will and create an impermissible causal relationship between the promise and the statements, thereby rendering any confession involuntary and inadmissible as evidence. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

[65] Appendix E, *infra*, at p. 30a (Department's Exhibit No. 2, admitted over Amedson's objections, discussed in Appendix M, *infra*, at pp. 118a - 119a (Order On Conduct At Hearing, ¶3.19 and ¶3.20)). The Court of Appeals likewise used such illegally obtained evidence as affirmation of the Board's action to revoke Amedson's

(continued...)

Because Amedson's Written Statement used against him to revoke his professional license in a quasi-criminal action was obtained by his forced cooperation on the promise of immunity and forgoing his Fifth Amendment rights, when such promised immunity was breached by the Board, Amedson's Written Statement must have been suppressed as the fruit of the poisonous tree. As concluded by the Presiding Officer, Amedson's claim of immunity and involuntariness presented questions of fact.[66] However, patently unlawful sanctions imposed upon Amedson by the Presiding Officer expressly prohibited him from presenting any testimony or evidence regarding or relating to his claims of immunity, involuntariness, or illegality of evidence.[67] Thus, under these sanctions the violation of his Fifth Amendment rights could not be used by Amedson as the basis for excluding his Written Statement or any other evidence obtained by the State related thereto or derived therefrom as *fruits of the poisonous tree*.[68]

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[65](...continued)
professional license. Appendix A, *infra*, at pp. 6a - 7a, 15a.

[66] Appendix M, *infra*, at p. 114a, ¶ 3.3.

[67] Appendix M, *infra*, at pp. 115a - 116a, ¶ 3.10.

[68] HHS/OIG Investigator Hinckley admitted to Amedson's counsel that federal immunity had been granted to elicit Amedson's cooperation. However, although this fact supports Amedson's credibility as to his claim of immunity, because of the *Touhy* bar, Hinckley was not available as a witness. This left Board Investigator Jeppesen as the only other witness to Amedson's claim of immunity from Board action who has proffered information on this issue, and such was instrumental in the Board's re-
(continued...)

Clearly, the use of testimony compelled under a promise of immunity, but then such promise broken by the government, and in violation of the State mini-*Miranda* statute should be excluded under the Fifth Amendment. However, this Court has not yet had occasion to consider whether the violation of Fifth Amendment rights via breach of promised immunity constitutes firm ground on which to exclude evidence of a testimonial nature and or derived therefrom under the *fruit of the poisonous tree* doctrine in professional license revocation quasi-criminal cases. Because such issue is critically important in this case, Amedson respectfully asks the Court to take this opportunity and confirm the applicability of such exclusionary rule so that there is no doubt on remand.

VI. CONCLUSIONS

The crux of this case is the application and extent of Fifth Amendment protections afforded the named Defendant in a quasi-criminal action against him and his professional license in a disciplinary in-

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[68](...continued)
vocation of Amedson's license and the State courts' affirmance. However, Jeppesen's credibility is now very suspect and subject to attack on the basis of a very recent State Supreme Court decision in *Jones v. State*, 170 Wn.2d 338, 351-52, 242 P.3d 825 (2010) (Jeppesen's alleged fabrication of evidence in investigation of a pharmacy). The fruit of the poisonous tree rule application under the Fifth Amendment would be essential to any Board hearing under remand from this Court and order to conduct such hearing in full compliance with Amedson's constitutional rights.

vestigation and adjudicative proceeding. The Fifth Amendment privilege against self-incrimination and right to remain silent without sanction and adverse consequence is a most valuable and sacred protection recognized and applied without exception by this Court in quasi-criminal actions since its decision in *Boyd* rendered 125 years ago.

Because the Washington Supreme Court expressly holds that professional license revocation proceedings are quasi-criminal actions, Amedson was undoubtedly entitled to invoke his full Fifth Amendment rights and privileges in the Board action against him. However, he was denied such full protection and was severely sanctioned for his steadfast assertion of his constitutional right to remain silent and privilege against self-incrimination without adverse consequence.

As a direct result, Amedson was unlawfully denied and deprived of his Sixth Amendment right to present his defense at any hearing unfettered in the manner in which he deemed necessary and appropriate; as is a time-honored right of citizens in this Country, he protested the patent violation of his constitutional rights by declining to participate in a sham proceeding, relying instead on the extensive prehearing record of motions and Orders to base judicial review; he was met with *Machiavellian* means employed by the courts to deny him the review of his most significant constitutional issues timely and properly raised; and his professional license stands revoked -- the administrative death penalty.

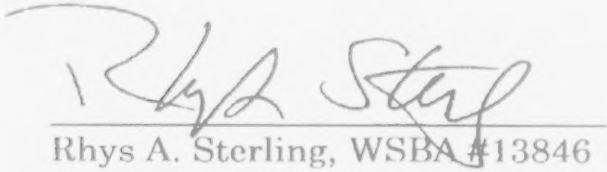
Although Amedson is not entitled to a perfect process, he is nevertheless legally entitled to an adjudicative process that does not bend or break his constitutional rights and privileges.[69]

For all the foregoing reasons, Amedson respectfully asks this Court to grant his Petition and allow the Writ for the review of these most significant constitutional issues presented in his case.

DATED this 19th day of April, 2011.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.



Rhys A. Sterling, WSBA #13846
Attorney for Petitioner Joseph R. Amedson

[69] *Gilland v. Commonwealth*, 35 S.E.2d 130, 134 (Va. 1945).

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APPENDICES

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APPENDIX B 19a	Washington Court of Appeals, Div II, Order Denying Motion For Reconsideration
APPENDIX C 21a	Washington Supreme Court Order [Denying Petition for Review]
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APPENDIX F 44a	Board of Pharmacy Prehearing Order No. 2: Order Denying Motion To Quash
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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

JOSEPH R. AMEDSON, individually and with respect to his licensure as a Pharmacist, No. PH00011607,	No. 39042-6-II
Petitioner,	
v.	
WASHINGTON STATE BOARD OF PHARMACY, a Board as established by law under RCW 18.64.001; WASHINGTON STATE DEPARTMENT OF HEALTH, an administrative agency of the State of Washington; ADJUDICATIVE SERVICE UNIT, a unit of the Washington State Department of Health; and ARTHUR E. DeBUSSCHERE, Health Law Judge, Presiding Officer, Adjudicative Service Unit, Department of Health,	UNPUBLISHED OPINION
Respondents.	

Bridgewater, P.J. -- Joseph R. Amedson appeals from a Thurston County Superior Court decision that affirmed the Washington State Department of Health (Department) decision to revoke his pharmacist license. We affirm.

FACTS

Background

In 2004, the Department and the Federal Department of Health and Human Services (HHS) were investigating A-Z Pharmacy. At some point after the investigation of A-Z Pharmacy began, Amedson voluntarily contacted the Department to discuss A-Z Pharmacy's prescription and billing practices. During the meeting with Department and HHS investigators, Amedson identified himself as an employee of A-Z Pharmacy and he claimed that certain A-Z Pharmacy employees were engaging in prescription fraud schemes. He provided investigators with a list of drugs he believed were a part of the scheme, including Zyprexa.[1] Amedson did not implicate himself in any prescription fraud schemes.

As a result of their investigation into A-Z Pharmacy, Department and HHS investigators discovered that Amedson was potentially linked to prescription fraud schemes involving Zyprexa. Consequently, Department investigators filed a complaint with the Department's Board of Pharmacy (Board) alleging Amedson's likely involvement in prescription fraud. Later, the Board approved an investigation of Amedson.

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[1] Zyprexa is a drug used for the treatment of mental illnesses, including schizophrenia and bipolar disorders.

Subsequently, Amedson voluntarily agreed to meet with Department and HHS investigators. According to the Department investigator, he informed Amedson before the meeting that the Department had opened an investigation of his alleged prescription fraud involving Zyprexa. During the meeting, the investigators presented evidence seized from A-Z Pharmacy implicating Amedson in the Zyprexa prescription fraud.[2] Amedson then provided detailed information about his involvement in the fraudulent scheme. According to the Department investigator, he provided Amedson with a packet explaining the investigation, informing Amedson of his rights, and indicating that any written statement he made could be used in disciplinary proceedings.

In addition, Amedson signed a "Respondent's Written Statement Notice" identifying Amedson as the respondent. AR at 802 (all capitalization omitted). The notice informed Amedson that:

> **You may consult with an attorney, at your expense, prior to providing a written statement. Your statement may be used in a hearing if disciplinary action is deemed necessary regarding this matter.**

AR at 802. The acknowledgment in the notice further stated:

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[2] At least two of the falsified prescriptions were submitted in Amedson's name as the patient. Amedson did not have a valid prescription for Zyprexa.

> I received this notice from WSBP Investigator Stanley Jeppesen before providing my voluntary written statement.

AR at 802.

Five days later, Amedson again met with the Department and HHS investigators. Amedson reviewed a written summary of the oral statements he made, and he requested changes to accurately convey his involvement in the prescription fraud scheme. Over a two hour meeting, the investigators incorporated all of Amedson's requested edits. When he was satisfied with the statement, Amedson signed the 11-page document. On each of the 11 pages, Amedson initialed the following statement:

> I have received no threats, promises or coercion, in preparing this statement. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and I will so testify.

AR at 804-14. Within the statement, Amedson admitted to participating in a Zyprexa fraud scheme during the course of his employment at the A-Z Pharmacy. He admitted that he had received approximately $3,500 as a result of the scheme.

Procedure

On June 5, 2007, the Department issued a statement of charges alleging unprofessional conduct

by Amedson under the Uniform Disciplinary Act (UDA), chapter 18.130 RCW. It specifically alleged unprofessional misconduct under RCW 18.130.180 (1),[3] (6),[4] (7),[5] and (13),[6] RCW 18.64.160(3),[7] and RCW

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[3] RCW 18.130.180(1) defines as unprofessional conduct:

> The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not.

[4] RCW 18.130.180(6) defines as unprofessional conduct:

> The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself.

[5] RCW 18.130.180(7) defines as unprofessional conduct:

> Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice.

[6] RCW 18.130.180(13) defines as unprofessional conduct: Misrepresentation or fraud in any aspect of the conduct of the business or profession.

[7] RCW 18.64.160(3) provides grounds for disciplinary action against a pharmacist's license, including knowingly violating "any provision of any state or federal law, rule, or regulation governing the possession, use, distribution, or dispensing of drugs."

69.41.020(5).[8] Amedson denied the charges, asserted affirmative defenses, and requested a hearing.

During discovery, Amedson refused to appear at a deposition to which he was subpoenaed. He claimed that federal prosecutors had granted him immunity arising out of the criminal prosecution of A-Z Pharmacy. In addition, he asserted a privilege against self-incrimination under the Fifth Amendment to the United States Constitution. Amedson failed to produce any evidence supporting his alleged immunity agreement. The presiding officer denied Amedson's motion to quash the deposition notices. Amedson filed a motion to reconsider, claiming in a declaration that he also had an oral immunity agreement with the Department investigator. Soon thereafter, Amedson moved to suppress all oral and written statements he had provided the investigators. The presiding officer denied the motion because Amedson failed to establish the existence of any oral immunity agreement by clear and unequivocal evidence.

The Department subsequently moved for sanctions based on Amedson's refusal to appear for the deposition. The presiding officer ordered Amedson to appear to state his claimed privilege as the basis for not answering each posed question. Amedson again refused to appear. He then moved to dismiss the disciplinary case based on his alleged immunity. The presiding officer denied the motion because Amedson failed to establish that he had an immunity agreement

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[8] RCW 69.41.020(5) prohibits a person from making or uttering "any false or forged prescription or other written order for legend drugs."

or that he qualified for immunity as a whistleblower.

During a final prehearing conference, the presiding officer ruled on and summarized all the pretrial rulings. In addition, he defined conduct for the hearing. For example, the presiding officer limited the issues for the Board's consideration to whether Amedson's conduct violated RCW 18.130.180(1), (6), (7), and 13; RCW 18.64.160(3); and RCW 69.41.020(5), consistent with the original charges. And he prohibited Amedson from arguing that he was entitled to immunity as a whistleblower or as a result of any alleged immunity agreement that he had.

Moreover, the presiding officer ruled that Amedson willfully interfered with the Board's proceedings when he refused to attend the Department's depositions. He concluded that sanctions were appropriate for Amedson's willful interference with the proceedings under WAC 246-11-170.[9] As a sanction, the presiding officer ordered that Amedson could not testify about information that the Department was unable to discover due to his failure to appear at depositions.

Amedson filed a motion for reconsideration of the Board's final pretrial order. Within that motion, he informed the Board that unless it reversed its final pretrial order, he would protest by not attending the hearing.

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[9] WAC 246-11-170 states that grounds for sanctions include "(a) Failure to comply with these rules or orders of the presiding officer; and (b) Willful interference with the progress of proceedings."

On March 7, 2008, the Board commenced a hearing on the allegations that Amedson acted unprofessionally under the UDA. Neither Amedson nor his counsel appeared, placed objections on the record, made opening or closing arguments, or cross-examined witnesses. The presiding officer found Amedson in default and conducted the hearing in his absence. The Board heard testimony from Department investigators and it admitted four Department exhibits. In addition, the Board admitted two exhibits Amedson had marked for admission during the pretrial process.

On April 26, 2008, the Board issued its final decision and order revoking Amedson's license to practice pharmacy in Washington, with no right to reapply for reinstatement for 20 years. The Board's final decision included its order of default against Amedson, in addition to notification that should Amedson seek to vacate the default order, he was required to do so within seven days after service of the order. Rather than filing a motion to vacate the default order, Amedson petitioned for judicial review in Thurston County Superior Court on May 14, 2008, seeking direct review by the Court of Appeals. The superior court denied Amedson's motion to transfer review to the Court of Appeals. It later affirmed the Board's decision. Amedson appeals.

ANALYSIS

Standard of Review

The UDA governs the discipline of pharmacists. RCW 18.64.163. Medical disciplinary proceedings

serve two purposes: (1) to protect the public and (2) to protect the standing of the medical profession in the eyes of the public. *In re Kindschi*, 52 Wn.2d 8, 11, 319 P.2d 824 (1958). The UDA confers on the Board authority to discipline pharmacists. *See* RCW 18.130.050; RCW 18.64.005.

We review the Board's orders under the Washington Administrative Act (APA), chapter 34.05 RCW. *Ames v. Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009), *cert. denied*, 130 S.Ct. 1528 (2010); *DaVita, Inc. v. Dep't of Health*, 137 Wn. App. 174, 180, 151 P.3d 1095 (2007). In reviewing an administrative action, we sit in the same position as the superior court, applying the APA to the Board record. *DaVita*, 137 Wn. App. at 180. As the party challenging the Board action, Amedson bears the burden of establishing it was invalid. *DaVita*, 137 Wn. App. at 180 (citing RCW 34.05.570(1)(a)).

We review the Board's factual findings to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise. *DaVita*, 137 Wn. App. at 181. We review the Board's legal conclusions de novo; although, we grant substantial weight to the Board's interpretation of its own statutes and rules. *DaVita*, 137 Wn. App. at 181. In a medical disciplinary proceeding, the Department must prove license revocation by "clear and convincing evidence." *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002).

The Board's Decision

As an agency, the Board had authority to enter a default judgment against Amedson for failing to attend or participate in the hearing. RCW 34.05.440(2);[10] WAC 246-11-280(3);[11] *Graves v. Dep't of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). Once a default judgment was entered, Amedson was required to file a motion to vacate the default order within seven days after service of the default order. RCW 34.05.440(3). Filing means actual receipt of the motion to vacate by the Adjudicative Service Unit in Olympia, Washington. RCW 34.05.010(6).

Here, Amedson not only failed to appear at the hearing but he also failed to file a motion to vacate the default judgment within seven days. There is no evidence that Amedson filed any a motion to vacate the default judgment. Therefore, he has waived his right to argue that the Department's default judgment was invalid. The APA requires a petitioner to exhaust

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[10] RCW 34.05.440(2) provides:
If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

[11] WAC 246-11-280(3) provides:
If a party requests an adjudicative proceeding but fails to appear at the hearing, the presiding officer may issue an order of default in the same manner as subsection (2) of this section, or may proceed to hear the matter in the absence of the party and issue a final order.

all administrative remedies before judicial review is appropriate. RCW 34.05.534.[12] Accordingly, we will not disturb the Board's default judgment against Amedson.

In any event, despite filing the default judgment against Amedson, the Board heard the matter in his absence. Under the Department regulations, the Board had no obligation to decide the matter on the merits once it entered the default judgment. WAC 246-11-280(3) (presiding officer may enter default judgment *or* proceed to hear the matter in the party's absence).[13]

We could end our analysis here, but because Amedson does not even acknowledge his failure to challenge the dispositive default judgment, we briefly address the merits of the Board's decision, and we arrive at the same conclusion. Notwithstanding the default judgment, Amedson has failed to meet his burden of proving the Board's revocation of his pharmacy license was invalid. *See DaVita*, 137 Wn. App. at 180 (citing RCW 34.05.570(1)(a)). Based on the record before us, the Board's factual findings are supported by substantial evidence and those factual findings support its legal conclusions. *DaVita*, 137 Wn. App. at 181.

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[12] Amedson makes no attempt to argue that he should be relieved from the requirement to exhaust administrative remedies because those remedies would be patently inadequate or futile, or that grave irreparable harm would result from having to exhaust the administrative remedies available to him. See RCW 34.05.534(3).

[13] Amedson does not challenge WAC 246-11-280 on appeal.

The Department's evidence overwhelmingly established that Amedson voluntarily contacted the Department to discuss fraudulent activities ongoing at his place of employment. It established that Amedson neglected to inform the investigators during this first meeting of his complicity in the fraudulent schemes. The evidence further established that the Department eventually opened an investigation into Amedson, informed Amedson of its investigation, and provided Amedson with notice that he had a right to consult an attorney before providing any written statement and that the Department could use any written statement Amedson made against him in a disciplinary action. Nevertheless, Amedson worked with Department investigators, without counsel, over the course of several days and hours to craft an accurate statement. The evidence shows that Amedson signed that statement, in which he admitted to participating in a reimbursement scheme to defraud a drug manufacturer for reimbursement of Zyprexa, a pharmaceutical. Amedson admitted to receiving about $3,500 for his participation in the fraudulent Zyprexa scheme. Finally, there is no evidence that the Department granted Amedson immunity in exchange for his statement or that Amedson qualifies for statutory immunity. Reviewing the record before us on appeal, the Department established by clear and convincing evidence that Amedson violated RCW 18.130.180(1), (6), (7), and (13), RCW 18.64.160(3), and RCW 69.41.020(5). The Board's decision to revoke

Amedson's pharmacy license for no less than 20 years[14] is supported by the record. *See Nguyen*, 144 Wn.2d at 518.

Constitutional Issues

Amedson raises several constitutional issues. The crux of his appeal is based on the premise that he was entitled to the constitutional privilege against compulsory self-incrimination equivalent to that of a criminal defendant under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. He further contends that the Board denied him an opportunity to present a defense under the Sixth Amendment to the United States Constitution. We decline to reach the merits of Amedson's remaining issues. By refusing to participate in the hearing, Amedson failed to exhaust his administrative remedies. *See* RCW 34.05.534. *See, e.g., Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 936, 808 P.2d 1155 (1991) (plaintiffs were not entitled to review by appellate court because they failed to exhaust their remedies when they refused to attend the equivalent of an administrative hearing). At a minimum, Amedson could have appeared at the hearing through counsel to state his objections on the record. Instead, he issued an ultimatum to Board, stating in no uncertain terms that unless the Board reversed its pretrial orders he would protest by not attending the disciplinary hearing that he initially requested.

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[14] Amedson does not challenge the length or severity of the revocation on appeal.

Moreover, Amedson has made no attempt to argue that the administrative remedies would have been patently inadequate, exhaustion would have been futile, or he would have suffered grave irreparable harm that would clearly outweigh the public policy requiring exhaustion of the administrative remedies available to him. *See* RCW 34.05.534(3). Accordingly, we will not entertain the merits of Amedson's constitutional issues.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

s/ Bridgewater, P.J.
Bridgewater, P.J.

I concur:

s/ Hunt, J.
Hunt, J.

Quinn-Brintnall, J. (concurring separately) -- I concur with the majority opinion decision to affirm the decision of the Washington State Department of Health to revoke Joseph Raise Amedson's pharmacist license. I write separately to emphasize that Amedson knowingly and intentionally refused to participate in the Board's licensing review process. The Board had authority to enter a default judgment against

Amedson for failing to attend or participate in the hearing and it did so. RCW 34.05.440; WAC 246-11-280(3); *Graves v. Dep't of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). Because the default judgment was proper, the merits of any claims Amedson could have, but did not, preserve now lie beyond the legitimate scope of our review. Accordingly, the portion of the majority opinion referencing the merits of Amedson's claims is dicta and I concur solely in that portion of the majority opinion establishing the legitimacy of the default judgment.

s/ Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

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STATE OF WASHINGTON

BY s/
DEPUTY

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

JOSEPH R. AMEDSON, individually and with respect to his licensure as a Pharmacist, No. PH00011607, Petitioner, v. WASHINGTON STATE BOARD OF PHARMACY, a Board as established by law under RCW 18.64.001; WASHINGTON STATE DEPARTMENT OF HEALTH, an administrative agency of the State of Washington; ADJUDICATIVE SERVICE UNIT, a unit of the Washington State Department of Health; and ARTHUR E. DeBUSSCHERE, Health Law Judge, Presiding Officer, Adjudicative Service Unit, Department of Health, Respondents.	No. 39042-6-II **ORDER DENYING MOTION FOR RECONSIDERATION**

APPELLANT moves for reconsideration of the Court's August 17, 2010 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Hunt, Quinn-Brintnall

DATED this 14th day of September, 2010.

FOR THE COURT:

s/ Hunt, P.J.
PRESIDING JUDGE

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STATE OF WASHINGTON

BY s/
DEPUTY

APPENDIX C

THE SUPREME COURT OF WASHINGTON

JOSEPH R. AMEDSON, individually and with respect to his licensure as a Pharmacist, No. PH00011607, Petitioner, v. WASHINGTON STATE BOARD OF PHARMACY, a Board as established by law under RCW 18.64.001; WASHINGTON STATE DEPARTMENT OF HEALTH, an administrative agency of the State of Washington; ADJUDICATIVE SERVICE UNIT, a unit of the Washington State Department of Health; and ARTHUR E. DeBUSSCHERE, Health Law Judge, Presiding Officer, Adjudicative Service Unit, Department of Health, Respondents.	NO. 85181-6 ORDER C/A NO. 39042-6-II

Department II of the Court, composed of Chief Justice Madsen and Justices Alexander, Owens, J.M. Johnson and Wiggins, considered at its February 1,

2011, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 2nd day of February, 2011.

For the Court

s/ Madsen, C.J.
CHIEF JUSTICE

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STATE OF WASHINGTON

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BY RONALD R CARPENTER
CLERK

APPENDIX D

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

JOSEPH R. AMEDSON, Petitioner, v. DEPARTMENT OF HEALTH, BOARD OF PHARMACY, an agency of the state of Washington, Respondents.	)	Docket No. 08-2-01147-7 ORDER ON JUDICIAL REVIEW

This matter came before the Court on the Petition for Judicial Review filed by Joseph Amedson ("Petitioner"), which sought review of the Board of Pharmacy's Findings of Facts, Conclusions of Law, and Final Order for Docket 07-04-A-1080PH, dated April 26, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court issued the attached Letter Opinion in this matter dated February 25, 2009 following its consideration of the Petitioner's Brief in support of judicial review, the Respondent's Brief in Response to judicial review, Petitioner's Reply, supporting papers,

argument of counsel on December 19, 2008, and the certified administrative record on file in this matter. The attached Letter Opinion identifies the issues considered by the Court and sets forth its Findings of Fact and Conclusions of Law in this matter.

ORDER

Based on the Court's Findings of Fact and Conclusions of Law as set forth in the attached Letter Opinion, it is hereby adjudged, decreed and ordered that the Board's final order is AFFIRMED.

DATED this 4th day of March, 2009.

s/ Christine A. Pomeroy
JUDGE CHRISTINE POMEROY

Presented by:
ROBERT M. MCKENNA
ATTORNEY GENERAL of WASHINGTON
By: s/ Cindy C. Gideon 3/3/09
Cindy C. Gideon, WSBA No. 28365
Assistant Attorney General
Attorneys for Respondents
360-664-0083

Approved as to form only; Notice of Presentment Waived by:
RHYS A. STERLING, P.E., J.D.
By: s/ Rhys A. Sterling 3/3/2009
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February 25, 2009

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LETTER OPINION

Re: Joseph R. Amedson v. Department of Health, Board of Pharmacy et al
Thurston County No. 08-2-01147-7

Dear Counsel:

This matter came before the court for trial on December 19 2008. The issue before the Court is whether the Petitioner can assert his 5th Amendment Right not to testify at the Department of Health Administrative hearing and not have the "failure to testify" be used against him at the disciplinary hearing.

In this case Department of Health law judge issued a pre-hearing Order 10, which sanctioned the respondent for not appearing at two depositions and therefore the respondent was precluded from asserting his right against self incrimination at the disciplinary hearing and precluding a claim of immunity or testimony regarding illegally obtained information because the Department was prevented from conducting discovery.

The Presiding Officer ruled that the Board may be allowed to draw "adverse inferences" of the Respondent refuses to answer a question on the ground it might incriminate him.

This Court upholds the disciplinary board's right to issue the pre-hearing Order 10 and to require the Defendant to appear and give testimony or be penalized. The penalties imposed by the Presiding Officer were appropriate.

This is a civil case and although he may assert his right to remain silent and not to testify against himself, this may be used against him in a civil case.

This Court finds the oral and written statement given to Department Investigator Jeppesen and McLean were properly admitted and based on the record the Court agrees with the Department of Health Law Judge that there was no oral immunity agreement between the Petitioner and the Department of Health investigators.

The Court finds the Petitioner is not a "whistleblower" in these facts and can not claim protection from the licensing authority under the RCW's and WAC's.

The Board's final order is affirmed. I will sign Findings of Fact and Conclusions of Law consistent with this ruling upon presentation.

Sincerely,

s/ Christine Pomeroy
Christine A. Pomeroy
Superior Court Judge

CAP/dkr

cc: Court File

FILED

MAR 04 2009

Superior Court
Betty J. Gould
Thurston County Clerk

APPENDIX E

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	Master Case No.
	)	M2007-73807
Respondent	)	
	)	FINDINGS OF
	)	FACT, CONCLU-
	)	SIONS OF LAW
	)	AND FINAL
	)	ORDER
	)	(Failure to Appear)
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

BOARD PANEL: Rebecca Hille, Public Member,
Panel Chair
Dan Connolly, R.Ph.
George Roe, R.Ph.

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

The Board of Pharmacy (Board) convened a hearing on March 7, 2008, in Tumwater, Washington. Neither the Respondent nor his counsel appeared at the hearing. The Presiding Officer granted the Department's motion and ordered the Respondent to be in default. Based upon the files and records for this case, along with the presentation of evidence made by the Department at the hearing, the Board issues this final order. License Revoked.

I. ISSUES

A. Whether the Respondent's conduct that has been alleged in the Statement of Charges constitutes unprofessional conduct under RCW 18.130.180(1), (6), (7), and (13), RCW 18.64.160(3), and RCW 69.41.010(5)?

B. If the Respondent engaged in unprofessional conduct, then what sanction(s) as authorized by RCW 18.130.160 should be imposed?

In his prehearing filings and in his Answer, the Respondent indicated, in part, that he planned to argue in his defense (1) that the Respondent was granted immunity; and (2) the evidence should be suppressed, because it was gathered from his involuntary statements.

SUMMARY OF PROCEEDINGS

At the hearing, the Respondent failed to appear. The Presiding Officer found the Respondent in default and proceeded with the hearing. At the hearing, the Department presented the testimony of Stan Jeppesen and Kelly McLean. Before the hearing, the Presiding Officer issued an order admitting the Department and Respondent's exhibits: *See Prehearing Order No. 10: Order on Motions and Order on Conduct at Hearing.* The following four Department exhibits were admitted:

Department Exhibit No. 1: Respondent's Written Statement Notice, dated March 16, 2006.

Department Exhibit No. 2: Respondent's Written Statement, dated March 21, 2006.

Department Exhibit No. 3: Zyprexa Prescription Summary (14 prescriptions): A-Z Pharmacy & Medical Supply/ Eli Lilly and Company.

Department Exhibit No. 4: Zyprexa Prescriptions.

The following two Respondent's exhibits were admitted:

Respondent Exhibit No. 4: Investigative Memorandum, by Stan Jeppesen, March 7, 2005; Re: A-Z Pharmacy.

Respondent Exhibit No. 7: Memorandum from Stan Jeppesen to Joseph Amedson, dated July 6, 2007, Re: Personal Statement.

Based upon the evidence presented, the Presiding Officer makes the following:

I. FINDINGS OF FACT

1.1 On September 19, 1983, the State of Washington issued the Respondent a credential to practice as a pharmacist. The Respondent's credential is currently active.

1.2 Between approximately May 2002 and November 2004, the Respondent was employed as an independent contractor pharmacist at A-Z Pharmacy located in Bellevue, Washington.

1.3 In October 2004, Stan Jeppesen and Kelly McLean, Department of Health investigators for the Board of Pharmacy, met the Respondent. The Respondent had contacted Investigator McLean by voice mail. She returned the call, during which time the Respondent explained that he wanted to meet with her in person about issues that were going on at his workplace, A-Z Pharmacy in Bellevue. The Respondent voluntarily met with Mr. Jeppesen and Ms. McLean at the Red Lion Hotel in Bellevue, Washington.

1.4 At the meeting in October 2004, the Respondent revealed what he thought was illegal activities at A-Z Pharmacy for billing of prescriptions when the prescriptions were not actually filled. He called it prescription "pumping." He identified Zyprexa (a legend drug)[1] and other expensive drugs

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[1] Zyprexa is the brand name of a generic drug called Olanzapine. It is an antipsychotic drug used to treat individuals (continued...)

that should be looked at, because they would generate a high reimbursement. He mentioned that he had previously given some information to the Washington State Department of Social and Health Services, and to the federal government.

1.5 Mr. Jeppesen participated in the meeting with the Respondent in order to gain additional knowledge about an investigation of A-Z Pharmacy that he was already pursuing with an investigator from the United States Department of Health and Human Services (HHS). This federal agency was investigating Medicaid and Medicare fraud. At the October 2004 meeting, the Respondent spoke in general terms of activities at A-Z Pharmacy. The information provided by the Respondent confirmed and supported what Mr. Jeppesen had known as a result of his ongoing investigation. The Respondent did not inform or make any admissions of his illegal activities to Mr. Jeppesen and Ms. McLean. The Respondent was not at that time the focus of any investigation. No written statements were requested.

1.6 After the meeting with the Respondent in October 2004, Mr. Jeppesen shared the information obtained with a federal investigator Timothy Hinckley, HHS. Since Mr. Jeppesen had a doctorate in pharmacy and had been a pharmacist for 20 some years, Mr. Hinckley asked Mr. Jeppesen to help go through documents obtained at A-Z Pharmacy. In

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(...continued)
with a chronic condition. The Pill Book, 9th Edition, Silverman, Harold M., Editor-in-Chief, p. 751.

December 2005, Mr. Jeppesen discovered an additional fraudulent scheme going on at A-Z Pharmacy regarding Lilly Pharmaceutical. On December 14, 2005, Mr. Jeppesen identified fraudulent Zyprexa prescriptions associated with the Respondent.

1.7 In December 2005, Mr. Jeppesen submitted a complaint to the Board relative to the Respondent's conduct in this matter. The Board approved the investigation in the middle of February 2006. After approval, Mr. Jeppesen was assigned to the case. He and Mr. Hinckley arranged for an interview with the Respondent at the Barnes and Noble Store in Bellevue, Washington, to be held on March 16, 2007.

1.8 When Mr. Jeppesen was arranging the interview with the Respondent, he informed the Respondent that he was the subject of an investigation. When Mr. Jeppesen gave the Respondent the Written Statement Notice (the Notice) (Department Exhibit No. 1), it was part of an overall notice of investigation. On March 16, 2006, Mr. Jeppesen personally handed the Respondent the Notice, which, in part, read that the Respondent had a right to an attorney, prior to providing any written statement, and the statement may be used in a disciplinary action. The Respondent signed the statement. The Notice identified Joseph Amedson as the "Respondent." Then, Mr. Hinckley and Mr. Jeppesen spent two hours going over investigation materials including the Zyprexa coupons. Mr. Jeppesen did not promise the Respondent any immunity. Moreover, at no time during this conversation was immunity discussed. Mr. Jeppesen

informed the Respondent implicitly that he would anticipate that the Board would take action against his license. No written statement was obtained from the Respondent at that time.

1.9 Investigators Hinckley and Jeppesen arranged for a follow-up meeting with the Respondent one week later to go over the information discussed and to have the Respondent sign a written statement. The meeting would be at Mr. Hinckley's office in downtown Seattle, Washington. The Respondent agreed to be at the meeting scheduled for March 21, 2006. Based upon the information obtained from the Respondent on March 16, 2006, Mr. Jeppesen drafted a Statement for the Respondent to sign. At the meeting on March 21, 2006, Mr. Hinckley, Mr. Jeppesen, and the Respondent worked for two hours with a computer and printer. They went through the written statement line by line and made corrections and deletions for accuracy. The Respondent, Mr. Jeppesen, and Mr. Hinckley signed each page of the 18-page statement. (Department Exhibit No. 3).

1.10 At the meeting on March 21, 2006, Mr. Jeppesen did not discuss immunity with the Respondent. Mr. Jeppesen. had informed the Respondent that he expected the Board to take action against his license, and if the Board wanted to offer any consideration for his help with the federal government, then that was up to the Board. At the end of the meeting, the Respondent discussed with Mr. Hinckley his relief of not being prosecuted federally. Mr. Jeppesen was not aware of any immunity agreement offered by the federal prosecutor. Mr. Jeppesen had not offered to the Respondent any

whistleblower protection. After Mr.. Jeppesen obtained the statement from the Respondent, he closed his investigation.

1.11 In the statement signed by the Respondent on March 21, 2006 (Department Exhibit No. 3), the Respondent admitted to participating in a reimbursement scheme to defraud a drug manufacturer for reimbursement of Zyprexa pharmaceutical. Between approximately June 2003 and December 2003, the Respondent engaged in a scheme with individuals at A-Z Pharmacy, wherein they forged prescriptions of Zyprexa, which were then reimbursed from the drug manufacturer using coupons the Respondent stole from another place of employment. The coupons were provided by the drug manufacturer for those who could not afford the medication, and thus could obtain it under the coupon. Some prescriptions were manufactured by taking legitimate prescriptions written by a physician with the patient's name whited-out and another patient's name written in. These prescriptions, therefore, would have a legitimate photo copy of a doctor's signature at the bottom of the prescription. In total, 14 coupons were fraudulently redeemed for more than $7,000.00. For his participation in this scheme, the "Respondent received half of this amount."

II. CONCLUSIONS OF LAW

2.1 The Respondent has been licensed to practice as a pharmacist at all times material to the Statement of Charges. The Board has jurisdiction to hear this matter, pursuant to Chapter 18.79 RCW, and

the Uniform Disciplinary Act, Chapter 18.130 RCW. RCW 18.130.140 and RCW 18.79.120. *See* also WAC 246-11-001 through WAC 246-11-020.

2.2 The Board has the authority to discipline pharmacists under the Uniform Disciplinary Act, chapter 18.130 RCW and RCW 18.130.160.

2.3 If the Respondent fails to appear at a scheduled hearing, the Presiding Officer may issue an order of default. RCW 34.05.440(2) and WAC 246-11-280(3). At the hearing, the Presiding Officer ordered that the Respondent was in default and proceeded to hear this matter in the absence of the Respondent.

2.4 The Washington Supreme Court held that the constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence. *Ongom v. Dept. of Health*, 159 Wn.2d 132 (2006); cert. denied 127 S. Ct. 2115 (April 2007).

2.5 The Uniform Disciplinary Act, chapter 18.130 RCW, provides definitions of what conduct, acts, or conditions constitute unprofessional conduct. RCW 18.130.180. In this case, unprofessional conduct was alleged under four subsections of RCW 18.130.180:

> The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at

the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

RCW 18.130.180(1);

The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

RCW 18.130.180(6);

Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

RCW 18.130.180(7); and

Misrepresentation or fraud in any aspect of the conduct of the business or profession;

RCW 18.130.180(13).

2.6 Under RCW 18.130.180(7), the Statement of Charges alleged two other statutory violations:

> Disciplinary action against pharmacist's and intern's licenses - Grounds. In addition to the grounds under RCW 18.130.170 and 18.130.180, the Board of Pharmacy may take disciplinary action against the license of any pharmacist or intern upon proof that:
>
> . . .
>
> (3) He or she has knowingly violated. or permitted the violation of any provision of any state or federal law, rule, or regulation governing the possession, use, distribution, or dispensing of drugs, including, but not limited to, the violation of any provision of this chapter, Title 69 RCW, or rule or regulation of the board;

RCW 18.64.160(3) and

> Prohibited acts Information not privileged communications. Legend drugs shall not be sold, delivered, dispensed or administered except in accordance with this chapter.
>
> (5) No person shall make or utter any false or forged prescription or other written order for legend drugs.

RCW 69.41.020(5).

2.7 Based upon Findings of Fact 1.1 through 1.11, the Department proved by clear and convincing

evidence that the Respondent violated RCW 18.13.0.180(1), (6), (7), and (13), RCW 18.64.160(3), and RCW 69.41.020(5). The above Findings of Fact do not support the Respondent's arguments made in his defense. The Board's investigator, Mr. Jeppesen, did not discuss immunity with the Respondent. There was no immunity agreement between the Respondent and the Board. Further, the Respondent voluntarily offered information to the Board investigators and voluntarily signed a statement admitting to activities that constituted unprofessional conduct.

2.8 As a result of the above Findings of Fact and these Conclusions of Law, the Presiding Officer may impose sanctions under RCW 18.130.160. Regarding sanctions, the Presiding Officer must first consider the protection of the public.

> Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority and in determining what action is appropriate, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder or applicant.

RCW 18.130.160.

In this case, the Board concludes that to protect the public, the Respondent's license should be revoked. The Respondent knowingly participated in a fraudulent coupon scheme for his own personal gain

and the conduct occurred in his work setting. The conduct was a planned scheme involving repeated acts of making fraudulent prescriptions. The Respondent should be prevented from practicing as a pharmacist in the state of Washington.

III. ORDER

Based upon the above, the Presiding Officer hereby orders:

3.1 The Respondent's license to practice as a pharmacist in the state of Washington is REVOKED;

3.2 The Respondent is prohibited from re-applying or reinstatement of his license to practice as a pharmacist for at least twenty (20) years from the date this order is signed; and

3.3 Upon reapplication, the Respondent will be required to comply with the requirements existing for applicants at the time of his application.

Dated this 26th day of April, 2008.

s/ Rebecca Hille
REBECCA HILLE, Public Member
Panel Chair

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

NOTICE OF PROTECTIVE ORDER

A protective order was issued in this matter. *See* Prehearing Order Number 11, which stated: The

Presiding Officer GRANTS the Respondent's Motion for Confidentiality. Accordingly, the Presiding Officer ORDERS that the motions, responses, and replies filed by the parties (including the supporting documentation also filed by the parties), and Prehearing Orders Nos. 1 through 11, shall be exempt from public disclosure. Further. the Department's Exhibits Nos. 1 through 4 and Respondent's Exhibits Nos. 4 and 7 shall also be exempt from public disclosure. This Protective Order shall remain in full force and effect, unless there is a further order by a presiding officer releasing the records for public disclosure, or unless a court in review orders that the records be made available for public disclosure.

CLERK'S SUMMARY

Charge	Action
RCW 18.130.180(1)	Violated
RCW 18.130.180(6)	Violated
RCW 18.130.180(7)	Violated
RCW 18.130.180(13)	Violated

ORDER OF DEFAULT

Within seven days after service of the Order of Default, the Respondent may file a written motion requesting that the order be vacated, and stating the grounds why the order should be vacated. During the time within which a party may file a written motion under this subsection, the Presiding Officer may adjourn the proceedings or conduct them without the

participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. RCW 34.05.440(3). WAC 246-10-204. The motion must be filed with the Adjudicative Service Unit, P.O. Box 47879, Olympia, Washington 98504-7879. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order of Default was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

NOTICE TO PARTIES

This Order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Board of Pharmacy
PO Box 47863
Olympia, WA 98504-7863

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within 30 days after service of this Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

[NOTE – By separate document entitled Declaration Of Service By Mail, this Final Order was confirmed as mailed to the parties on April 30, 2008. Signed by Bruce Bronoske, Jr., Adjudicative Clerk Office, Hearing Scheduler.]

APPENDIX F

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 2:
Respondent	)	ORDER DENYING
	)	MOTION TO
	)	QUASH
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, R.Ph., by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on a Motion to Quash filed by the Respondent. Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. RESPONDENT'S MOTION AND DEPARTMENT'S RESPONSE

1.1 On November 6, 2007, the Respondent filed a Motion to Quash Department's Notice of Deposition and Subpoena Duces Tecum, and for Entry of Protective Order. The Respondent's motion included a background statement, legal argument and conclusions. Attached was a verification signed by the Respondent dated November 5, 2007. The Respondent also filed two proposed orders: (1) *Proposed* Order Granting Amedson's Motion to Quash and for Protective Order; and (2) *Proposed* Protective Order for Respondent Amedson.

1.2 On November 19, 2007, the Department filed a Response and Objection to Respondent's Motion to Quash (1) Notice of Deposition (2) Calling Respondent as a Witness at Hearing; and Department's Response and Objection to Request to Exclude Respondent's Written Statement. Attached with the Department's Response were the following five exhibits:

D-1: Notice of Deposition and Subpoena Duces Tecum to Joseph R. Amedson, Docket No. 07-04-A-1080PH, Board of Pharmacy, dated October 10, 2007;

D-2: Respondent's First Discovery Request for Production of Records and Documents, and Identification of Witnesses, Re: Joseph R. Amedson, Docket No. 07-04-A-1080PH, Board of Pharmacy, dated July 27, 2007;

D-3: Subpoena Ad Testificandum Issued to Stanley Jeppesen, Robert (Troy) Parks and J. Timothy Hinckley, Re: Joseph R. Amedson, Docket No. 07-04-A-1080PH, Board of Pharmacy.

D-4: Subpoena Duces Tecum for Production of Records and Documents Issued to Stanley Jeppesen, Robert (Troy) Parks and J. Timothy Hinckley, Re: Joseph R. Amedson, Docket No. 07-04-A-1080PH, Board of Pharmacy.

D-5: Statement by Joseph Amedson, R. Ph., dated March 21, 2006, Case #06-10400 and Case #05-10184, Department of Health, Board of Pharmacy.

1.3 On November 21, 2007, the Respondent filed a Reply to Department's Response and Objection to Motion to Quash.

ARGUMENT OF THE PARTIES

The Respondent cited cases to support his assertion that he has a Fifth Amendment right against self-incrimination. By then, asserting that this proceeding is a quasi criminal proceeding, the Respondent argued that his Fifth Amendment right applies here. The Respondent also asserts that his Fifth Amendment protection should preclude him from appearing at a scheduled deposition, and from responding to a subpoena against him to produce documents. The Respondent asserts that he should not be required to testify as an adverse witness for the Department's case at the hearing, and he seeks a

protective order.

In support of his assertions, the Respondent reported that there is an open criminal proceeding in *United States v. Alexander Milan, et. al.*, CR06-245JLR. He argues that since this federal prosecution remains open, the Respondent remains in jeopardy and must invoke his constitutional right to remain silent.

The Respondent reported the following about the criminal proceeding and the federal Human and Health Services investigator, J. Timothy Hinckley:

> Amedson was expressly promised immunity from federal prosecution by Mr. Hinckley during the course of the A-Z Pharmacy Investigation. However, the Statement of Charges filed by the Board against Amedson has caused a drastic shift in positions. Although Amedson was subpoenaed to testify at the federal trial, he was forced to invoke his right to remain silent because of the pendency of this quasi-criminal disciplinary action and its pointed allegations of illegal acts and conduct. It now appears that federal prosecutors have unilaterally reshaped the promised immunity orally given to Amedson to now be grounded on not only his full cooperation at the investigative stage (as to which he fulfilled his commitment), but also on his giving testimony at trial (which he was forced to decline on constitutional grounds).

> Although the trials were canceled as the named defendants all entered pleas, Amedson. remains in jeopardy as this federal matter, according to federal officials, remains open.

Respondent's Brief, p. 3. n. 4.

The Department argued that the Respondent has failed to demonstrate that any criminal proceedings have been instituted against him. Although, the Respondent referenced a federal criminal proceeding (*U.S. v. Milman*, CR06-245JLR), the Department argued that all the named defendants have entered pleas and the sentencing hearing for these defendants was held on November 19, 2007. The Department argued that based upon that criminal proceeding, the Respondent cannot claim any Fifth Amendment Privilege, refuse to testify in a deposition or at the hearing, or refuse to turn over documents.

Further, the Department argued that when a witness refuses to answer a question on the grounds that it might incriminate him, the trier of fact is entitled to draw an inference from his refusal to testify.

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case, the Respondent moved to quash the Department's Notice of Deposition and to quash the Department's subpoena duces tecum. The Respondent also moved for a

protective order.

2.2 On October 10, 2007, the Department served upon the Respondent a Notice of Deposition and Subpoena Duces Tecum. The Department notified the Respondent to appear for the deposition scheduled for December 3, 2007, in Olympia, Washington.

2.3 The rules governing discovery are found in chapter 246-11 RCW.

Discovery. The parties are encouraged to exchange information and documents related to the case prior to the adjudicative proceeding. Formal discovery is obtained as follows:

> (b) Unless otherwise limited by order of the presiding officer in accord with these rules, the scope of discovery shall be as follows:
>
> (i) Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter in the pending action. It is not grounds for objection that the information sought will be inadmissible at the adjudicative proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

WAC 246-11-370(1)(b)(i).

2.4 The taking of a deposition is found under WAC 246-11-370(3).

Depositions may be taken subject to the following conditions:

. . .

(c) After notice is served for taking a deposition, or upon motion of the presiding officer, or upon motion reasonably made by any party or by the person to be examined, and upon notice and for good cause, the presiding officer may issue an order that the deposition shall not be taken or that it be taken subject to specified restrictions, conditions, or limitations.

WAC 246-11-370(3)(c).

2.5 The Respondent also moved to quash the Department's subpoena duces tecum, upon which the rules apply.

(8) The presiding officer, upon motion made promptly and before the time specified for compliance in the subpoena, may:

(a) Quash or modify the subpoena if the subpoena is unreasonable or requires evidence not relevant to any matter at issue; or

(b) Condition denial of the motion upon just and reasonable conditions, including advancement of the reasonable cost by the person on whose behalf the subpoena is issued of producing the books, documents, or tangible things; or

(c) Issue a protective order under

RCW 34.05.446.

WAC 246-11-220(8).

2.6 The Washington Appellate Court recognizes that the Fifth Amendment privilege permits a person to refuse to testify at a criminal trial, or to refuse to answer official questions asked in any other proceeding, where the answer might tend to incriminate him or her in future criminal proceedings. *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 351 (2002), *review denied*, 143 Wn.2d 290 (2001) (footnote citation omitted).

2.7 Washington law acknowledges that the Fifth Amendment privilege against self-incrimination applies to a quasi-criminal proceeding.

> [The] Fifth Amendment privilege against compulsory self-incrimination applies "in any criminal case", U.S. Const Amend. 5, as well as in quasi-criminal cases, *Boyd v. United States*, 116 U.S. 616, 633-34, 29 L. Ed. 746, 6 S. Ct 524 (1886), but not in civil enforcement proceedings. [*United States v] Ward*, 448 U.S. [242,] at 248, 251-55, (1980).

Washington v. Ankney, 53 Wn. App. 393, 397 (1989) (citations added in brackets).

2.8 Washington courts have described the nature of a disciplinary proceeding for health care professionals.

> It is somewhat difficult to classify a medical disciplinary proceeding. It is

> characterized as civil, not criminal, in nature; yet it is quasi criminal in that it is for the protection of the public, and is brought because of alleged misconduct of the doctor involved. Its consequence is unavoidably punitive, despite the fact that it is not designed entirely for that purpose.

In re Revocation of License of Kindschi, 52 Wn.2d 8, 10-11 (1958) (emphasis added).

2.9 Washington courts have continued to hold that a disciplinary proceeding is quasi criminal in nature:

> A professional license revocation proceeding has been determined to be "quasi-criminal" in nature and, accordingly, entitled to protections of due process.

Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 474 (1983) (citations omitted). *See* also, *Clausing v. Department of Health, Board of Osteopathic Medicine & Surgery*, 90 Wn. App. 863, 874 (1998); *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 523 (2001); *Ongom v. Department of Health, Office of Professional Standards*, 159 Wn.2d 132, 138 (2006).

2.10 The Court in *Olympic Pipe Line* held that although the Respondent has a Fifth Amendment right, the existence of pending charges or a criminal investigation does not bar proceeding with civil

litigation arising out of the same factual allegations.

> The mere pendency of related civil and criminal proceedings does not prevent the civil proceedings from going forward. "The Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. "

Olympic Pipe Line, 104 Wn. App. at 352 (footnote citations omitted).

2.11 Further, when the Court in *Olympic Pipeline* stated that the invoking of the Fifth Amendment right depends on the. status of the criminal proceeding. "'It is well established that the privilege protects against real dangers, not remote and speculative possibilities.'" *Olympic Pipe Line* 104 Wn. App. at 359 (footnote citations omitted).

2.12 In this case, the Respondent's explanation of his involvement in *U.S. v. Milman* is unclear. The Respondent has not shown how the facts in the criminal proceeding are the same for this proceeding. Further, it was noted in the parties' briefing here that the criminal proceeding did not go to trial and that the defendants' sentencing hearings occurred on November 19, 2007.

2.13 The Respondent also failed to provide any notices or pleadings from the federal prosecutor stating that he could be indicted. He has not declared that he has appeared in that proceeding for purposes of an indictment issued to him. He has not shown that a criminal investigation and/or proceeding have been

instituted against him or that he is a subject to a criminal proceeding or an investigation.

2.14 The Respondent stated that the federal prosecutors have reshaped their promised immunity given to him, which required him to give testimony at trial. He declined to give such testimony, but the criminal proceeding did not go to trial. Nevertheless, he believes that he has failed, in part, to abide by all the terms of his immunity agreement with federal prosecutors. He believes that the immunity agreement
that had been granted to him is in jeopardy. This explanation about the criminal proceeding is speculative.

2.15 Even if the Respondent were to show that there a real danger of criminal prosecution, there is no blanket right to refuse to testify.

> There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim.

Olympic Pipeline 104 Wn. App. at 351, n. 20 (citing *Eastham v. Arndt*, 28 Wn. App. 524, 532, (1981)).

2.16 Further, when a party in a civil case invokes the Fifth Amendment privilege against self-incrimination in response to a question or statement, there is no constitutional prohibition against the trier

of fact drawing an adverse inference from the party's silence. *Olympic Pipeline* 104 Wn. App. at 355-56 (citations omitted); *Ikeda v. Curtis*, 43 Wn.2d 449, 458-459 (1953) (fraud in the sale of a hotel); *State Farm Fire and Casualty Co. v. Huynh*, 92 Wn. App. 454, 462 (1998) (insurance fraud).

2.17 Thus, in this case, the Department is entitled to conduct discovery and should be allowed to discover information for the hearing in this disciplinary action. The Respondent does not have a blanket right to refuse to answer all the questions, and thus the Respondent's deposition should not be quashed. Further, for the same reasons, the subpoena duces tecum issued upon the Respondent should not be quashed. When the Respondent appears at a deposition or at the hearing and invokes the Fifth Amendment, an adverse inference could be drawn from his refusal.

2.18 Since the Respondent is required to appear at the scheduled deposition, it is not necessary to order that the Respondent answer interrogatories. WAC 246-11-370(1)(a). If the Department seeks to pursue discovery through interrogatories, then the Department may file such a motion to make that request.

2.19 The Respondent also moved for a protective order precluding the Respondent from appearing at a deposition and from being called to testify. The rules allow the Presiding Officer to issue a protective order. RCW 34.05.446. WAC 246-11-400. In considering the Respondent's request for a protective order, the Presiding Officer applied the same information provided for his motion to quash. In

the criminal case, upon which the Respondent referenced, the defendants have entered their pleas and the sentencing hearing occurred on November 19, 2007. There is now only speculation whether the Respondent immunity agreement is in jeopardy. It is unknown if the Respondent will ever be charged. Although the Respondent has the right to invoke his privilege, a protective order should not be entered precluding him from being deposed and from being called to testify at the hearing.

III. ORDER

Based upon the above and consistent with the above Conclusions of Law, the Presiding Officer hereby issues the following ORDERS:

3.1 The Respondent's motion to quash the Department's Notice of Deposition scheduled for December 3, 2007, is DENIED.

3.2 The Respondent's motion to quash the Department's Subpoena Duces Tecum issued to Respondent returnable on December 3, 2007 is DENIED.

3.3 The Respondent's motion for a protective order shielding the Respondent from being subject to deposition or being called to testify as an adverse witness for the hearing in this case is DENIED.

Dated this 28th day of November, 2007.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 28th DAY OF NOVEMBER, 2007.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

APPENDIX G

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	) Docket No.
	) 07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)
License No. PH00011607,	) PREHEARING
	) ORDER NO. 4:
Respondent	) ORDER DENYING
	) MOTION FOR
	) RECONSIDERA-
	) TION OF PRE-
	) HEARING ORDER
	) NO. 2

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on a Motion for Reconsideration of Prehearing Order

No. 2: Order Denying Motion to Quash filed by the Respondent. Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. RESPONDENT'S MOTION AND DEPARTMENT'S RESPONSE

1.1 On December 3, 2007, the Respondent filed a Motion for Reconsideration of Prehearing Order No.2, Order Denying Motion to Quash. The Respondent moved that the Presiding Officer reconsider his order denying the Respondent's motion to quash entered on November 28, 2007.

1.2 On December 3, 2007, the Department filed a Response to Respondent's Motion for Reconsideration. The Department requested that the Respondent's motion for reconsideration be denied.

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case, there is no legal basis for a motion to reconsider a prehearing motion. Under the rules, there is a provision for reconsideration under WAC 246-11-580(1), but this rule provides for reconsideration of final orders.

2.2 The Respondent argued that the Presiding Officer misapplied the holding in *King v. Olympic Pipeline Co.*, 104 Wn. App. 338 (2002) to this proceeding. The Respondent also argued that the Presiding Officer failed to understand the implications that this proceeding has been determined to be quasi-

criminal in nature. *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466 (1983).

2.3 In his motion for reconsideration, the Respondent repeats the same arguments made in support of his motion to quash a subpoena and notice of deposition that were served upon him. Thus, it is not necessary for the Presiding Officer to repeat the Conclusions of Law set forth in Prehearing Order No. 2, Order Denying Respondent's Motion to Quash. Further, in this case, whether at a deposition or at the disciplinary hearing, when the Respondent invokes his Fifth Amendment privilege against self-incrimination in response to a question or statement, the Pharmacy Board may draw an adverse inference from the Respondent's silence. *Olympic Pipeline* 104 Wn. App. at 355-56 (citations omitted); *Ikeda v. Curtis*, 43 Wn.2d 449, 458-459 (1953); *State Farm Fire and Casualty Co. v. Huynh*, 92 Wn. App. 454, 462 (1998). The Respondent's motion for reconsideration of Prehearing Order No. 2 should be denied.

III. ORDER

Based upon the above, the Presiding Officer hereby DENIES the Respondent's Motion for Reconsideration of Prehearing Order No. 2, which is the Order Denying Motion to Quash.

Dated this 21st day of December, 2007.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 24th DAY OF DECEMBER, 2007.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-000

APPENDIX H

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 5:
Respondent	)	ORDER ON
	)	RESPONDENT'S
	)	MOTION TO
	)	SUPPRESS
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on Respondent's Motion in Limine to Suppress Oral and Written Statements and to Exclude All Resulting

Fruit of Poisonous Tree. Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. RESPONDENT'S MOTION TO SUPPRESS, RESPONSE, AND REPLY

1.1 On November 19, 2007, the Respondent filed a Motion in Limine to Suppress Oral and Written Statements and to Exclude All Resulting Fruit of Poisonous Tree. The Respondent included a Verification signed by himself verifying the relevant facts set forth in this motion. The Respondent also included a proposed order for signature.

1.2 On November 30, 2007, the Presiding Officer signed an Order Granting Extension allowing the Department to respond by December 3, 2007, and the Respondent to reply by December 13, 2007.

1.3 On December 3, 2007, the Department filed a Response and Objection to Respondent's Motion to Suppress Oral and Written Statements and to Exclude All Resulting Fruit of the Poisonous Tree. In support of its Response, the Department included the Declarations of Assistant Attorney General (AAG) Cindy C. Gideon and Department of Health Investigator Stan Jeppesen. Included and reference in the Declaration of Stan Jeppesen were four exhibits identified as Exhibits A-D.

Exhibit A: Complaint Form dated February 1, 2006;

Exhibit B: Complaint Form dated February 10, 2006;

Exhibit C: Respondent's Written Statement Notice dated March 16, 2006; and

Exhibit D: Respondent's Statement dated March 21, 2006.

1.4 On December 10, 2007, the Respondent filed a Reply Brief on Motion in Limine to Suppress and Motion to Strike and Motion to Compel. In support of this reply, the Respondent included:

Exhibit R-1: Letter from AAG Cindy Gideon dated October 23,2007; and

Exhibit R-2: Declaration of Joseph R. Amedson, dated December 5,2007.

II. MOTION TO SUPPRESS

2.1 The Respondent moved that the Presiding Officer issue an order on the following:

(1) Suppress the reference to and or use in any manner for evidentiary or other purpose, including impeachment, any and all alleged oral statements and information given by Respondent to the Board of Pharmacy Investigator Stanley R. Jeppesen and any others, including and not limited to Investigator Kelly M. McLean, and/or to Special Agent J. Timothy Hinckley in and/or purportedly related to the investigation of A-Z Pharmacy at the state or federal level;

(2) Suppress the reference to and/or use in any manner for evidentiary or other purposes, including and not limited to

prosecution, impeachment or indicia of waiver or relinquishment of constitutional rights and privileges and/or proof of voluntariness, (a) that certain alleged written document entitled "Respondent's Written Statement Notice" dated March 16,2006, at 9:30 p.m. and note in the Amedson, PHa record as Bates No. Inv. 000000031, and (b) that certain alleged written document entitled "Statement" dated March 21, 2006, at 4:40 p.m., and noted in the Amedson, Pha record as Bates Nos. Inv. 000000118 - 000000128, inclusive; and

(3) Exclude and prohibit the use of and/or reference of whatever kind and form stemming from, arising or discovered from, and/or related to those oral statements and/or written documents in Subparts (a) and (b) above as fruit of poisonous tree.

2.2 The Respondent argued that he has a constitutional right and privilege against self incrimination. He argued that any extra-judicial statement or admission sought to be used against him, must be shown to have been voluntarily as an act of his own free will. The Respondent maintains that the oral and written statements made by him to the government investigators, were all involuntarily made under the immunity given to him by these government investigators, Stan Jeppesen and J. Timothy Hinckley. Finally, the Respondent asserts that since his statements must be suppressed, then all evidence

stemming from such illegally obtained statements should be held inadmissible for any purpose.

III. CONCLUSIONS OF LAW

3.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case and as stated above, the Respondent moved to suppress all written and oral statements made by himself regarding this adjudicative proceeding.

3.2 In support of his argument that he had an immunity agreement with investigator Stan Jeppesen, the Respondent asserted that immunity agreements are considered contractual in nature and are subject to the rules of contract. In support, the Respondent cited *State v. Bryant*, 146 Wn.2d 90 (2002). In *State v. Bryant*, the King County Prosecuting Attorney'.s Office entered into a written "use/derivative use immunity" agreement.

3.3 In this case involving the Respondent, the Respondent maintains there was an oral immunity agreement. However, the terms of this oral agreement was not stated. Further, the Respondent did not maintain that the agreement was with the Office of Attorney General, the agency that prosecutes these disciplinary actions.

3.4 In this case and based upon his assertions, the Respondent must show that there was an oral contract that granted him immunity. An oral contract was addressed by the Washington Supreme Court in *Groeneveld v. Dean*, 40 Wn.2d 109 (1952), in which the court held:

> The burden of proof which rested upon appellants relative to establishing the existence of such a contract, is stated as follows in *Granquist v. McKean*, 29 Wn. (2d) 440, 445, 187 P. (2d) 623:
> "The first requirement of the doctrine that part performance of an oral contract exempts it from the provisions of the statute of frauds is that the contract be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.
> "A mere preponderance of the evidence is not sufficient. If the evidence leaves it at all doubtful as to whether or not a contract was entered into, the court will not decree specific performance."

Groeneveld v. Dean, 40 Wn.2d at 111 (citations omitted). In *Groeneveld v. Dean*, the Court addressed the issue whether there was an oral contract for the sale of timber.

3.5 In *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846 (2001), the court address an oral contract issue. The court held that the burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention. *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. at 851 (citation omitted). In determining this issue regarding a summary judgment motion, the court cited the rule regarding the determination of

fact. "[B]are assertions of ultimate facts and conclusions of fact are alone insufficient to defeat summary judgment." Id.

3.6 The Department presented facts contesting the Respondent's assertion of an immunity agreement. In his Declaration, Investigator Jeppesen, asserted that he at no time, at a meeting in October 2004 or in any other communication with the Respondent, promised that the Board of Pharmacy would not take action against the Respondent's license when he provided a statement or evidence. *See* Declaration of Stan Jeppesen, Paragraph 9.

3.7 Further, on February 1, 2006, Mr. Jeppesen submitted a complaint to the Board of Pharmacy regarding fraudulent prescriptions written in the name of the Respondent. On February 13, 2006, the Board of Pharmacy gave Mr. Jeppesen written authorization to investigate this complaint. Mr. Jeppesen stated in his declaration that at a meeting on March 16, 2006, he informed the Respondent that the Board of Pharmacy had begun an investigation against him regarding the prescription fraud. On March 16, 2006, the Respondent signed a Written Statement Notice, identifying him as a "Respondent" and stating the following:

> You may consult with an attorney, at your expense, prior to providing a written statement. Your statement may be used in a hearing if disciplinary action is deemed necessary regarding this matter.

Department's Exhibit C. Mr. Jeppesen's conduct set forth in his declaration is consistent with this Written Statement Notice, which was signed by the Respondent.

3.8 Further, the Respondent's assertion that he has an immunity agreement with a federal investigator, J. Timothy Hinckley, was insufficient to support his argument that he has an oral immunity agreement with Mr. Jeppesen. In her declaration, Ms. Gideon reported that she was informed by Mr. Peter Winn, an Assistant United States Attorney, of the following:

> . . . that Mr. Amedson was not given "formal immunity," which must be granted by the Department of Justice in Washington, D.C., nor was he given "limited immunity" which would be evidenced by a letter given to him or his counsel at the interview for the investigation of this matter.

Declaration of AAG Gideon, Paragraph 11. Although this statement is hearsay, it can be considered in an administrative proceeding. RCW 34.05.452(1). The Respondent's motion to strike this hearsay statement should be denied. In addition, this evidence undermines the Respondent's assertions about his oral immunity agreement made with Mr. Jeppesen.

3.9 In light of the circumstances and the facts presented, the Respondent's assertion that Stan Jeppesen orally granted him immunity at the Doubletree Hotel in October 2004, was insufficient to

establish such an immunity agreement. The Respondent relies on this bare assertion to support his oral contract with the Department's investigator. That is, the Respondent failed to show by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of such an oral contract granting immunity.

3.10 On March 21,2006, which was six days after the Respondent signed the Written Statement Notice, the Respondent signed a written statement, which was a written account of his oral statements (the Written Statement). The Respondent signed the Written Statement as an accurate account of his testimony, and initialed on each and every page of this 11 page document as the following:

> I have received no threats, promises or coercion, in preparing this statement. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and I will so testify.

Department's Exhibit D. The Respondent made this Written Statement knowingly, intelligently, and voluntarily. Thus, the Presiding Officer should deny the Respondent's request that this Written Statement be excluded because of the fruit of the poisonous tree doctrine.

3.11 In *State v. Bryant*, 146 Wn.2d at 100-101, the Court held that King County Prosecutors did not have authority under principles of contract law to enter into an immunity agreement with Snohomish

County. Thus, even if the Respondent had an immunity agreement with a federal prosecutor, he cannot argue that the federal investigator had authority to bind the Washington State Board of Pharmacy.

3.12 In the Respondent's reply, the Respondent moved to compel the production of the following documents:

> (1) The "packet" of information purportedly given to Amedson on March 16, 2006 allegedly informing Amedson that he is the target of a Board investigation prior to Amedson signing and advising Amedson of his rights in such investigation, and (2) notes, memoranda, records or other memorialization on electronic or tape media or otherwise regarding and relating to the meetings with Amedson on March 16" 2006 and on March 21, 2006.

The Presiding Officer concludes that the Department should file a response to this motion. Upon receipt of the Department's response, the Presiding Officer can address this motion to compel.

IV. ORDER

Based upon the above, the Presiding Officer hereby issues the following ORDERS:

5.1 The Presiding Officer DENIES in this case the following Respondent's motions:

(1) To suppress the reference to and or use in any manner for evidentiary or other purpose, including impeachment, any and all alleged oral statements and information given by Respondent to the Board of Pharmacy Investigator Stanley R. Jeppesen and any others, including and not limited to Investigator Kelly M. McLean, and/or to Special Agent J. Timothy Hinckley in and/or purportedly related to the investigation of A-Z Pharmacy at the state or federal level;

(2) To suppress the reference to and/or use in any manner for evidentiary or other purposes, including and not limited to prosecution, impeachment or indicia of waiver or relinquishment of constitutional rights and privileges and/or proof of voluntariness, (a) that certain alleged written document entitled "Respondent's Written Statement Notice" dated March 16, 2006, at 9:30 p.m., and note in the Amedson, PHa record as Bates No. Inv. 000000031, and (b) that certain alleged written document entitled "Statement" dated March 21, 2006 at 4:40 p.m., and noted in the Amedson, Pha record as Bates Nos. Inv. 000000118-000000128, inclusive; and

(3) To exclude and prohibit the use of and/or reference of whatever kind and form

stemming from, arising or discovered from, and/or related to those oral statements and/or written documents in Subparts (a) and (b) above as fruit of poisonous tree.

5.2 The Presiding Officer denies the Respondent's motion to strike hearsay statements made in the Declaration of AAG Gideon.

5.3 The Respondent's Motion to Compel, set forth in Paragraph 2.9 above, is deferred pending receipt of response from the Department by **January 9, 2008**.

Dated this 2nd day of January, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 3rd DAY OF JANUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

APPENDIX I

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 6:
Respondent	)	ORDER ON
	)	DEPARTMENT'S
	)	MOTION FOR
	)	SANCTIONS
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on a Motion for Sanctions for Respondent's Willful Refusal to Appear at His Deposition. Based upon the

filings made by the parties, the Presiding Officer hereby issues the following:

I. DEPARTMENT'S MOTION AND RESPONDENT'S RESPONSE

1.1 On December 5, 2007, the Department filed a Motion for Sanctions for Respondent's Willful Refusal to Appear at His Deposition, and filed a Declaration of AAG Gideon in Support of Sanctions. The Declaration referenced and attached the following documents:

D-1: Notice of Deposition and Subpoena Duces Tecum, Docket No. 07-04-A-1080PH, to Joseph R. Amedson, October 10, 2007.

D-2: Letters to Cindy C. Gideon from Rhys A. Sterling, dated November 28, 2007 and November 30, 2007.

D-3: Letter to Rhys A. Sterling from Cindy C. Gideon, dated November 30, 2007.

1.2 The Department moved for sanctions and an order of conduct at hearing because the Respondent failed to appear at his deposition under a Notice of Deposition and a Subpoena Duces Tecum.

1.3 On December 11, 2007, the Respondent filed a Response to Department's Motion for Sanctions. The Respondent attached the following documents:

R-1: Letter dated November 28, 2007 to Cindy C. Gideon from Rhys A. Sterling and Joseph R. Amedson.

R-2: Letter dated September 6, 2007 to Rhys A. Sterling from Timothy Menke.

1.4 The Respondent responded that the

Presiding Officer must deny this Motion, and the Presiding Officer is limited to the rules granted under Chapter 246-11 WAC.

II. FINDINGS ON MOTION FOR SANCTIONS

2.1 On October 10, 2007, the Department served upon the Respondent a Notice of Deposition and Subpoena Duces Tecum. The Department notified the Respondent to appear for the deposition scheduled for December 3, 2007, in Olympia, Washington.

2.2 On November 28, 2007, the Presiding Officer signed Prehearing Order No. 2 denying both the Respondent's Motion to Quash the Department's Notice of Deposition and the Department's Subpoena Duces Tecum. The Presiding Officer also denied the Respondent's motion for a protective order shielding the Respondent from being subject to deposition or being called to testify as an adverse witness for the hearing. The Respondent received this Order on November 29, 2007.

2.3 On Monday, December 3, 2007, Mr. Sterling informed Ms. Gideon that the Respondent would not appear at his deposition. The Respondent did not appear at his scheduled deposition.

III. CONCLUSIONS OF LAW

3.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case, the Department filed a Motion for Sanctions for the Respondent's Willful Refusal to Appear at His Deposition. The Presiding Officer reviewed and

considered the Department's Motion and the Respondent's Response.

3.2 Under the rules for this proceeding, a party may schedule a deposition and the opposing party may file a motion that the deposition not be taken. WAC 246-11-370(3). In this case, the Department served a Notice of Deposition upon the Respondent. The Presiding Officer denied the Respondent's Motion to quash his Notice of Deposition. Thus, the Notice of Deposition and the Subpoena Duces Tecum remains. The Respondent neither attended his deposition nor brought the requested documentation referenced in the Subpoena Duces Tecum.

3.3 The Respondent argued that sanctions should not be ordered because the Presiding Officer did not affirmatively direct the Respondent to attend the December 3, 2007 deposition. The Respondent also argued that the only action that .the Department has .in this case, is to seek enforcement of the subpoena by filing a petition in superior court, or by requesting the Presiding Officer to issue an order of default. In support of this argument, the Respondent cited WAC 246-11-220(9).

3.4 The Respondent is, in part, correct. To enforce a subpoena, the Department must seek either enforcement in superior court or request the Presiding Officer to issue an order of default. However, this rule, WAC 246-11-220(9), does not address the Respondent's failure to comply with the Notice of Deposition, particularly after the Presiding Officer issued an order denying the Respondent's request to quash said deposition.

3.5 The Respondent also argued that by not appearing at his deposition, he is asserting his constitutional right to remain silent. The Respondent's argument, however, has its limitations. There is no blanket right to refuse to testify.

> There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim.

King v. Olympic Pipe Line Co., 104 Wn. App. 338, 351, n. 20 (2000), *review denied*, 143 Wn.2d 1012 (2001) (footnote citing *Eastham v. Arndt*, 28 Wn. App. 524, 532, (1981). At his deposition, the Respondent shall appear and claim whatever privilege he believes to be the basis for not answering each and every question posed to him.

3.6 Further, in light of the Department's Motion for Sanctions, the Presiding Officer considered the rule for the Presiding Officer to order sanctions: Sanctions.

(1) Orders may include sanctions against either party.

(2) Grounds for sanctions may include:

(a) Failure to comply with these rules or orders of the presiding officer; and

(b) Willful interference with the

progress of proceedings.

(3) Sanctions may include:

(a) Dismissal of the matter;

(b) Proceeding in default; and

(c) Other sanctions as appropriate.

(4) The order shall state the grounds upon which any sanctions are imposed.

WAC 246-11-170.

3.7 In this case, the Respondent failed to comply with the rule requiring him to attend his deposition. WAC 246-11-370(3). In addition, the Respondent refused to attend after his motion to quash was denied. This is a willful interference with the progress of this proceeding.

3.8 In requesting sanctions, the Department requested that the Respondent be prohibited from introducing any witnesses, documents, photographs, or other evidence relating to the case, which could have been disclosed at his deposition. This request, however, is not sufficiently specific to determine what documents or other evidence could have been disclosed because of the Respondent's refusal to appear at his deposition.

3.9 Further, it is not necessary to issue the additional requested sanction, if the Respondent does appear, and refuses to answer a question on the grounds that it might incriminate him. The Presiding Officer has already ruled that the Board of Pharmacy is entitled to draw an adverse inference from this refusal to testify. *King v. Olympic Pipe Line Co.*, 104 Wn. App. at 355-56. *Ikeda v. Curtis*, 43 Wn.2d 449, 458-459 (1953) (fraud in the sale of a hotel). *State Farm Fire and Casualty Co. v. Huynh*, 92 Wn. App.

454, 462-463 (1998) (insurance fraud).

3.10 The Department should be allowed to pursue its discovery. WAC 246-11-220. WAC 246-11-370. Thus, the Presiding Officer should issue an order enforcing the Notice of Deposition issued by the Department. Failure to comply with this Notice of Deposition would be considered a further willful interference of the progress of proceedings, and such failure would necessitate additional sanctions. WAC 246-11-170(2).

III. ORDER

Based upon the above, the Presiding Officer hereby GRANTS the Department's motion for sanctions, and thereby ORDERS that the Respondent shall comply with an amended Notice of Deposition when issued by the Department for the purpose of taking the Respondent's testimony upon oral examination. The Respondent shall have four days notice of said amended deposition. The Respondent shall comply with the above stated conclusion in Paragraph 3.5. If the Department seeks to pursue the deposition, then the deposition shall be completed by February 7, 2008, unless the parties stipulate to a later date, or unless the Presiding Officer issues a subsequent modification order. The discovery deadline shall be extended only for this limited purpose.

Dated this 9th day of January, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 10th DAY OF JANUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

APPENDIX J

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 7:
Respondent	)	ORDER DENYING
	)	RESPONDENT'S
	)	MOTION TO
	)	DISMISS
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on Respondent's Motion to Dismiss with Prejudice the Board's Statement of Charges on Grounds of

Immunity. Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. RESPONDENT'S MOTION TO DISMISS, RESPONSE, AND REPLY

1.1 On November 19, 2007, the Respondent filed a Motion to Dismiss with Prejudice the Board's Statement of Charges on Grounds of Immunity (Motion to Dismiss). The Respondent moved for an order granting his Motion to Dismiss and thereby dismissing this disciplinary action against him with prejudice. The Respondent also requested that he be granted expenses and reasonable attorney fees, as well as an award of statutory damages.

1.2 "In support of his Motion to Dismiss, the Respondent included a Declaration of Joseph R. Amedson in Support of Motion to Dismiss, dated December 14, 2007. In his Declaration, the Respondent referenced his exhibit list, specifically Exhibit Nos. 6 and 8. He also referenced the investigative file, Bates No. Inv. 000000031. In his Declaration, the Respondent requested that his statement, along with other documents and records in this Board action, remain confidential and be withheld from disclosure as public records. The Respondent also filed a proposed order granting his Motion to Dismiss.

1.3 On December 27, 2007, the Department filed a "Response to Respondent's Motion to Dismiss. The Department requested that the Respondent's Motion to Dismiss be denied. In support of its

Response, the Department included a Declaration of AAG Gideon, which attached and referenced an Exhibit A, which is an email to Timothy Hinckley, dated November 28, 2007, and email from him dated November 29, 2007. In her Declaration, Ms. Gideon also referenced the Declaration of Stan Jeppesen previously filed earlier in this case. In support, the Department also relied upon prior responses to motions made in this proceeding.

1.4 On December 31, 2007, the Respondent filed a Reply Brief on Motion to Dismiss and Motion to Strike. The Respondent attached a letter to Rhys A. Sterling from Timothy Menke, dated September 6, 2007. The Respondent also moved to strike the Declaration of AAG Gideon and attachments, because it contained hearsay and lacked foundation and authentication regarding alleged oral and/or written correspondence with AUSA Winn and J. Timothy Hinckley.

II. FINDINGS OF FACT ON MOTION TO DISMISS

2.1 On or about December 14, 2005, Department of Health/Board of Pharmacy Investigator Stan Jeppesen discovered evidence that the Respondent was participating in a fraudulent prescription scheme. Mr. Jeppesen discovered this evidence in the course of another prescription fraud investigation involving the Respondent's Employer, A-Z Pharmacy (Case No. 05-10184). In fact, the Respondent was the complainant in that matter and had been providing evidence of A-Z Pharmacy's

wrongdoings. The Respondent, however, had not disclosed his own participation in a prescription fraud scheme. When Investigator Jeppesen uncovered such evidence, he submitted a formal complaint to the Board of Pharmacy. The submission was made on February 1, 2006.

2.2 On February 10, 2006, the Board of Pharmacy authorized a separate investigation on the Respondent. (Case No. 06-10400).

2.3 On March 16, 2006, Investigator Jeppesen, Federal Investigator Tim Hinckley, and the Respondent, met at Barnes and Noble book store in Bellevue, Washington. The Respondent signed a written statement:

> You may consult with an attorney, at your expense, prior to providing a written statement. Your statement may be used in a hearing if disciplinary action is deemed necessary regarding this matter.

Declaration of Investigator Jeppesen, Exhibit C, filed December 3,2007. The Respondent acknowledged his Written Statement Notice which states:

> I have received this notice from WSBP Investigator Stanley Jeppesen before providing my voluntary written statement.

Declaration of Investigator Jeppesen, Exhibit C, filed December 3, 2007. The Respondent provided

Investigator Jeppesen and Mr. Hinckley with oral statements and reviewed physical evidence provided to him in the matter involving A-Z Pharmacy, as well as evidence of his own participation in a separate prescription fraud scheme with A-Z Pharmacy.

2.4 On March 21, 2006, Investigator Jeppesen provided the Respondent with a written account of his oral statements. The statement detailed both his and A-Z Pharmacy's actions with respect to various prescription schemes. The statement identifies both case numbers (05-10184 and 06-10400). The Respondent signed the Written Statement as an accurate account of his testimony, and initialed on each and every page of an 11 page document, which stated:

> I have received no threats, promises or coercion, in preparing this statement. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and I will so testify.

Declaration of Investigator Jeppesen, Exhibit D, filed December 3, 2007.

2.5 In that Declaration, the Respondent admitted to his own participation in a separate prescription fraud scheme:

> Lilly Zyprexa Coupons: I, Amedson state that I took the Zyprexa coupons. . . from Valley Medical Center, Prescription Pad Pharmacy.

That I (Amedson) was working as a relief Pharmacist, and that a coupon book containing fourteen coupons for Zyprexa prescription full reimbursement were in the Pharmacy.

I, Amedson attest to the following:

- That I, Amedson took the Zyprexa coupons for myself. That it was my idea that the coupons could be billed for reimbursement to my gain, which was the reason that I took them to Valentina Milman at the AZ Pharmacy.

. . .

- That the coupon reimbursement was approximately $7000 and I received approximately $3,500 for myself, ...

Declaration of Investigator Jeppesen, Exhibit D, pp. 12-13, filed December 3, 2007.

III. CONCLUSIONS OF LAW

3.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case and as stated above, the Respondent moved to dismiss this disciplinary action. In addressing this motion, the Presiding Officer considered the filings and documentation filed by the parties referenced above.

3.2 A motion to dismiss for failure to state a claim will be treated as a motion for summary judgment when matters outside the pleadings are

presented, to and not excluded by, the trial court. *Bruce v. Byrne-Stevens & Assoc. Eng'rs*, 51 Wn. App. 199, 200 (1988), *rev'd on other grounds*, 113 Wn.2d 123 (1989).

3.3 An administrative agency may employ summary procedures, and may enter an order summarily disposing of a matter if there is no genuine issue of material fact. *Asarco v. Air Quality Coalition*, 92 Wn.2d 685, 697 (1979). Further, under the civil rules, summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

3.4 The moving party carries the initial burden of showing that there is no genuine issue of material fact, but once that burden has been met, the burden shifts to the non-moving party to establish otherwise. *Dutton v. Washington Physicians*, 87 Wn. App. 614, 621 (1997) *citing Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992).

3.5 In considering a motion for summary judgment, the health law judge must consider the facts in light most favorable to the nonmoving party, and grant summary judgment if reasonable persons could reach only one conclusion. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437 (1982) (citations omitted).

Respondent's Claim of Immunity.

3.6 In his Declaration, Investigator Jeppesen reported that he did not promise or otherwise allude

that the Respondent would be given immunity in the state administrative matter. In his Declaration, the Respondent reported that he was granted immunity by Mr. Jeppesen. This is a genuine issue of material fact and for this reason, the Respondent's Motion to Dismiss should be denied.

3.7 Although there are conflicting statements whether the Respondent was verbally promised immunity, the Respondent has otherwise failed to establish that there was an immunity agreement. There is no other evidence other than a bare assertion by the Respondent of an immunity agreement. There is no written documentation presented, no outline of the agreement or no written provisions. There is no written information about the scope of the agreement, which is an important factor, because it would show what protections the Respondent would receive for the information he would be providing. The Respondent did not provide any objective information to even support his claim of a limited or full range immunity. Finally, there is no evidence that those who would have had authority to offer immunity, an Assistant Attorney General or the Board of Pharmacy, had actually offered immunity to the Respondent.

3.8 In a prior Motion to Suppress filed earlier by the Respondent in this proceeding, the Respondent moved that his admissions should be suppressed from this disciplinary proceeding because of an alleged oral immunity agreement between the Respondent and the Department's investigator, Stan Jeppesen. The Presiding Officer denied this Motion to Suppress and concluded that in light of the circumstances and presented facts, the Respondent's verbal assertions

that Stan Jeppesen orally granted him immunity in October 2004 was insufficient to establish such an immunity agreement. In concluding that there was no oral contract granting immunity, the Presiding Officer cited cases involving contract law, *Groeneveld v. Dean*, 40 Wn.2d 109 (1952) and *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846 (2001). Thus, the Conclusions of Law made by the Presiding Officer in denying the Respondent's Motion to Suppress are incorporated in these conclusions. *See* Prehearing Order No. 5, Paragraphs 3.1 through 3.12.

3.9 The Presiding Officer concludes that the Respondent failed to show that he was granted immunity from prosecution in this proceeding.

Respondent's Argument for Safe Harbor Protection.

3.10 As an alternate reason in support of his motion, the Respondent argued that this case should be dismissed, because the Respondent is entitled to the safe harbor protection of RCW 4.24.510, which states:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local "government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the

> communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

RCW 4.24.510.

3.11 The Respondent's reliance on this statute is misplaced. Further, the Respondent's right on the "special right of action and special immunities" statute, RCW 4.24.500-.520, is equally misplaced. The statues provide protection to the complainant against a civil lawsuit from the person whom the information was provided about. There were no cases cited by the Respondent to show that this statute claimed protection from a licensing authority in disciplining a licensee for unprofessional conduct. The Respondent is a licensee, and subject to the rules and regulations governing his license.

3.12 The whistleblower statutes are not intended to protect the Respondent from his own criminal and/or unprofessional conduct. *See In re Discipline of Schafer*, 149 Wn.2d 148, 167-168 (2003) (RCW 4.24.500-.520 applies to good faith communications with government agencies and a

whistleblower must still abide by the rules governing his profession). Although the Respondent disclosed to the investigators the fraudulent scheme by A-Z Pharmacy, the whistleblower statute does not preclude the Department from initiating a disciplinary action against the Respondent for unprofessional conduct for this same fraudulent scheme.

3.13 In this case, even if the Respondent had a claim under RCW 4.24.510, there is a genuine issue of fact regarding the Respondent's good faith, communications. During the Department's investigation, the Respondent was discovered to be himself involved in a fraudulent scheme. Moreover, the Respondent has not established that his complaint was made in good faith as evidenced by his signed admission made in the presence of Mr. Jeppesen. By this admission, the facts support that the Respondent was an active participant in a criminal enterprise that included health care fraud and misrepresentation. The Commission must decide whether such conduct under the Uniform Disciplinary Act, chapter 18.130 RCW, was unprofessional. The Presiding Officer concludes that based upon this alternative argument, the Respondent's Motion to Dismiss should be denied.

3.14 Motion to Strike. Finally, in his reply, the Respondent moved to strike the Declaration of AAG Gideon and attachments thereto on grounds of hearsay and lack of foundation and authentication regarding alleged oral and/or written correspondence with AUSA Winn and J. Timothy Hinckley.

3.15 The Presiding Officer concludes that this motion should be denied. Although some of the statements made in the Declaration of Ms. Gideon

contain hearsay, it can be considered in an administrative proceeding. RCW 34.05.452(1).

3.16 Motion for confidentiality. The Respondent moved that because of the promised anonymity by the Department of Health, records in this case remain confidential and not be disclosed as a public record. The Respondent cited RCW 42.56.240(2).

3.17 This hearing under the Administrative Procedures Act, chapter 34.05 RCW, is a public hearing. RCW 34.05.449(5). However, the Presiding Officer can issue a Protective order. WAC 246-11-400. In this case, the Presiding Officer concludes that there is insufficient information to justify non-disclosure. The Respondent should clarify this motion and the Department should respond. Following this request, the Presiding Officer would be able to issue, if necessary, an appropriate protective order.

IV. ORDER

Based upon the above, the Presiding Officer DENIES the Respondent's Motion to Dismiss. Further the Respondent's motion to strike hearsay provisions in the Declaration of AAG Gideon is DENIED. Finally, the Respondent's motion for a protective order is deferred pending further clarification.

Dated this 25th day of January, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 28th DAY OF JANUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

APPENDIX K

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	) Docket No.
	) 07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)
License No. PH00011607,	) PREHEARING
	) ORDER NO. 8:
Respondent	) ORDER DENYING
	) RESPONDENT'S
	) MOTION TO
	) COMPEL
	)

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on Respondent's Motion to Compel. Based upon the filings made by the parties, the Presiding Officer

hereby issues the following:

I. RESPONDENT'S MOTION TO COMPEL, RESPONSE, AND REPLY

1.1 In the Respondent's reply on his Motion in Limine to Suppress Oral and Written Statements and to Exclude All Resulting Fruit of Poisonous Tree (Motion to Suppress), the Respondent moved to compel the production of the following documents:

> (1) The "packet" of information purportedly given to Amedson on March 16, 2006, allegedly informing Amedson that he is the target of a Board investigation prior to Amedson signing and advising Amedson of his rights in such investigation, and (2) notes, memoranda, records or other memorialization on electronic or tape media or otherwise regarding and relating to the meetings with Amedson on March 16, 2006 and on March 21, 2006.

Respondent's Reply Brief on Motion in Limine to Suppress and Motion to Strike and Motion to Compel, In Matter of Joseph R. Amedson, Docket No. 07-04-A-1080PH, pp. 2-4. In support of this motion, the Respondent included a letter from Cindy C. Gideon to Rhys Sterling dated October 23,2007. The Respondent also referenced an Investigative Report by Stan Jeppesen dated May 10, 2006 and a Declaration of Stan Jeppesen dated November 21, 2007.

1.2 In Prehearing Order No. 5: Order on Respondent's Motion to Suppress, the Presiding

Officer deferred ruling on Respondent's Motion to Compel pending receipt of a response from the Department.

1.3 On January 9, 2008, the Department filed a Response to Respondent's Motion to Compel and filed a Declaration of AAG Gideon in Support of Department's Response, and Objections to Respondent's Motion to Compel. In this Declaration of AAG Gideon, Ms. Gideon referenced and attached the following 10 attachments:

D-1: Letter to Rhys A. Sterling, Re: Joseph R. Amedson, dated August 20, 2007.

D-2: Special Investigative Report by Investigator Stan Jeppesen, dated May 30, 2006.

D-3: Attachment 1 of the Special Investigative Report by Investigator Stan Jeppesen.

D-4: Statement of Joseph Amedson, dated March 21, 2006.

D-5: Letter to Rhys A. Sterling, Re: Joseph R. Amedson, dated September 5, 2007.

D-6: Letter to Rhys A. Sterling, Re: Joseph R. Amedson, dated October 11, 2007, with attached Investigative Memorandum, from Stan Jeppesen, dated March 7, 2005.

D-7: Letter to Cindy Gideon, Re: Joseph R. Amedson, dated October 16, 2007.

D-8: Letter to Rhys A. Sterling, Re: Joseph R. Amedson, dated October 23, 2007.

D-9: Letter to Cindy Gideon, Re: Joseph R. Amedson, dated October 8, 2007.

D-10: Declaration of Stan Jeppesen, dated

November 21, 2007.

1.4 On January 14, 2008, the Respondent filed a Reply to Department's Response to Motion.

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case, the Respondent has submitted a Motion to Compel. Specifically, the Respondent is requesting the Department produce a "packet" of information "purportedly given to the Respondent on March 16, 2006, allegedly informing the Respondent that he is the target of a Board investigation." The Respondent maintains that he had previously issued to Mr. Jeppesen a Subpoena Duces Tecum requesting production of all such records and that the requested records were not produced.

2.2 In opposition to this motion, the Department showed that it provided all the documents requested by the Respondent in his discovery. In particular, the Department showed that it provided all requested discovery documents for the meetings between Mr. Jeppesen and the Respondent on March 16, 2006 and March 21, 2006.

2.3 Parties may obtain discovery by production of records or things; deposition upon oral examination; requests for admission; or, if ordered by the presiding officer, written interrogatories. WAC 246-11-370(1)(a).

2.4 Here, the Respondent failed to show that he had requested, during discovery, the materials now being requested pursuant to his Motion to Compel.

The Department provided to the Respondent the entire investigative file, absent the privileged material, and "all reports, notes, memorandum, and declarations." A letter from Cindy Gideon to Rhys Sterling dated October 23, 2007. During discovery, the investigator did a second check pursuant to the Respondent's request and no additional memoranda or notes were found.

2.5 In its response to this Motion to Compel, the Department showed that it provided the entire discovery requested by the Respondent. In his reply, the Respondent neither refuted this documentation, nor provided any documentation showing that he had requested copies of documents provided to the Respondent on March 16, 2006. Since this material had not been requested, there is now no basis for the Respondent's Motion to Compel.

2.6 In his Motion to Compel, the Respondent argued that inferences should be made because of what was omitted in the Investigative Report by Mr. Jeppesen on May 10, 2006, and what was asserted in the Declaration of Stan Jeppesen, dated November 21, 2007. The Respondent pointed out that in the Investigative Report, Mr. Jeppesen omitted to report that he informed the Respondent that the Board of Pharmacy had begun an investigation against him regarding prescription fraud. Yet in his Declaration, Mr. Jeppesen stated that "[a]t the March 16, 2006 meeting, I informed the Respondent that the Board of Pharmacy had begun an investigation against him regarding the prescription fraud." The Respondent argued that due to this inconsistency, there is an inference and thus, evidence that Respondent was, in

fact, not informed that an investigation had begun against him, and that the Respondent did not receive a packet of information about his rights.

2.7 The Presiding Officer cannot make such an inference because of what Mr. Jeppesen did not state or omitted in his Investigative Report. To make such an inference, the Presiding Officer would be speculating on what occurred or did not occur. Even assuming such an inference could be made, this would not be a basis for granting the Respondent's motion to compel. Even assuming that Mr. Jeppesen failed to issue a complete report, this would not be a basis for this Motion to Compel regarding discovery. Here, the Respondent failed to show that the Department did not comply with his prior discovery request, and so this motion to compel such discovery should be denied.

III. ORDER

Based upon the above, the Presiding Officer DENIES the Respondent's Motion to Compel.

Dated this 4th day of February, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed

with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 5th DAY OF FEBRUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

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APPENDIX L

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 9:
Respondent	)	ORDER DENYING
	)	MOTIONS FOR
	)	RECONSIDERA-
	)	TION
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on a Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions.

Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. RESPONDENT'S MOTION AND DEPARTMENT'S RESPONSE

1.1 On January 9, 2008, the Presiding Officer issued an Order on Department's Motion for Sanctions. The Presiding Officer ordered, in part, that the Respondent shall comply with an amended Notice of Deposition issued by the Department. *See* Prehearing Order No. 6.

1.2 On January 16, 2008, the Respondent filed a Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions.

1.3 On January 23, 2008, the Department filed a Response to Respondent's Motion for Reconsideration of Prehearing Order No. 6.

1.4 On January 23,2008; the Respondent filed a Reply to Department's Response to Respondent's Motion for Reconsideration of Prehearing Order No. 6. In this reply, the Respondent also moved to quash the Department's Amended Notice of Deposition issued on January 22, 2008.

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions. WAC 246-11-380(1). In this case, the Respondent filed a Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions. The Presiding Officer reviewed and considered the Respondent's motion, the

Department's response, and the Respondent's reply.

2.2 In this case, there is no legal basis for a motion to reconsider a prehearing order. Under the rules, there is a provision for reconsideration under WAC 246-11-580(1), but this rule provides for reconsideration of final orders. On this basis alone, the Respondent's Motion for Reconsideration should be denied.

2.3 In his motion for reconsideration, the Respondent argued that the Presiding Officer misapplied the holding in *King v.. Olympic Pipeline Co.*, 104 Wn. App. 338 (2002) to this proceeding. The Presiding Officer has already addressed this issue in prior orders in this proceeding, and there is no new basis for reconsideration. In this unique disciplinary proceeding, the label of "quasi-criminal" means that the Respondent is entitled to due process, including a heightened standard of proof, but not every procedural protection afforded to criminal defendants. *Nguyen v. Department of Health*, 144 Wn.2d 516, 534, 525, 528-529, *cert. denied*, 535 U.S. 904 (2002); *Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466,474-476 (1983); *In re Revocation of License of Kindschi*, 52 Wn.2d 8, 10-11 (1958). The Respondent's motion for reconsideration of Prehearing Order No. 6 should be denied.

2.4 In his reply, the Respondent also filed a Motion to Quash the Department's Amended Deposition issued January 22, 2008, and to issue an appropriate protective order recognizing the Respondent's full scope of constitutional rights and privileges. The Respondent stated that, notwithstanding the Presiding Officer's action

regarding his motion to quash prior to the scheduled date of the deposition, the Respondent respectfully, and in good faith, would decline to attend the deposition.

2.5 The Presiding Officer concludes that the Respondent has provided no new basis for his motion to quash that has not already been asserted in prior motions. The Presiding Officer has already addressed this matter. *See* Prehearing Order No. 2: Order Denying Motion to Quash. Thus, the Respondent's motion to quash should be denied.

III. ORDER

3.1 Based upon the above, the Presiding Officer hereby DENIES the Respondent's Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions. Further, the Presiding Officer DENIES the Respondent's Motion to Quash the Department's Amended Deposition issued January 22, 2008.

Dated this 6th day of February, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C.

GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 7th DAY OF FEBRUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit

cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.

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APPENDIX M

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of:	)	Docket No.
	)	07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph.,	)	
License No. PH00011607,	)	PREHEARING
	)	ORDER NO. 10:
Respondent	)	ORDER ON
	)	MOTIONS AND
	)	ORDER ON
	)	CONDUCT AT
	)	HEARING
	)	

APPEARANCES:

Respondent, Joseph R. Amedson, by
Rhys A. Sterling, P.E., J.D., per
Rhys A. Sterling, Attorney at Law

Department of Health Pharmacy Program, by
Office of the Attorney General, per
Cindy C. Gideon, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

This matter came before the Presiding Officer on pending prehearing motions, Respondent's

Prehearing Memorandum, and the Department's Prehearing Statement. Based upon the filings made by the parties, the Presiding Officer hereby issues the following:

I. PROCEDURAL HISTORY

1.1 On June 5, 2007, the Department served Statement of Charges upon the Respondent. After being granted an extension, the Respondent filed his Answer on July 24, 2007.

1.2 After a motion and a response, the Presiding Officer issued Prehearing Order NO. 1: Order Granting Leave to Amend Answer. On November 19, 2007, the Respondent filed First Amended Answer to Statement of Charges, and Request for Adjudicative Proceeding and Formal Hearing.

1.3 On August 1'7, 2007, the Presiding Officer conducted a scheduling conference before the parties, scheduling the prehearing conference for February 11, 2008, and the hearing for March 7, 2008. The Presiding Officer ordered discovery to be completed by January 11, 2008. The Presiding Officer ordered January 18, 2008 to be the filing deadline for dispositive motions, and ordered January 25, 2008 to be the filing deadline for all other motions. *See* Corrected Scheduling Order/Notice of Hearing (the Scheduling Order) issued August 27, 2007.

1.4 In accordance with the Scheduling Order, the parties filed documents with the Adjudicative Service Unit. On October 31, 2007, the Respondent filed an Identification of Possible Primary Witnesses

at Hearing. On October 26, 2007, the Department filed a Witness List. On November 28, 2007, the Respondent filed an exhibit list and Answer to Subpoena Duces Tecum and attached eight exhibits. On December 10, 2007, the Department filed an exhibit list and attached four exhibits. On February 5, 2008, the Respondent filed a Prehearing Memorandum. On February 7, 2008, the Department filed a Prehearing Statement. The Prehearing Memorandum and the Prehearing Statement included objections. to exhibits and witnesses, and included procedural motions. On February 11, 2008, the Respondent filed a Response to Department's Motion for Sanctions Set Forth in its Prehearing Memorandum.

1.5 After receipt of filed motions, responses, and replies, the Presiding Officer issued the following prehearing orders.

Prehearing Order No. 1: Order Granting Leave to Amend Answer, signed November 14, 2007;

Prehearing Order No. 2: Order Denying Motion to Quash, signed November 28, 2007;

Prehearing Order No. 3: Order Granting Extension, signed November 30, 2007;

Prehearing Order No. 4: Order Denying Motion for Reconsideration of Prehearing Order No. 2, signed December 21, 2007;

Prehearing Order No. 5: Order on Respondent's Motion to Suppress, signed January 9, 2008;

Prehearing Order No. 6: Order on Department's Motion for Sanctions, signed January 9, 2008;

Prehearing Order No. 7: Order Denying Respondent's Motion to Dismiss, signed January 25,

2008;

Prehearing Order No. 8: Order Denying Respondent's Motion to Compel, signed February 4, 2008.

Prehearing Order No. 9: Order Denying Motions for Reconsideration, signed February 6, 2008.

II. PREHEARING MOTIONS

In addition to the motions already filed and ruled upon in this case, there are two additional filed motions pending before the Presiding Officer.

A. Respondent's Motion for Reconsideration of Prehearing Order No. 7.

2.1 On February 1, 2008, the. Respondent filed Amedson's Motion for Reconsideration of Prehearing Order No. 7, Re: Denial of Motion to Dismiss and Clarification of Motion for Confidentiality. In this Motion for Reconsideration of Prehearing Order No. 7, the Respondent again moved for dismissal of this proceeding. The Respondent also moved to compel production of all communications with the Inspector General, United States Department of Human and Health Services (DHHS), prior to contacting J. Timothy Hinckley. The Respondent also provided clarification of his request for confidentiality of records.

2.2 On February 8, 2008, the Department filed a Response to Respondent's Motion for Reconsideration of Prehearing Order No. 7. The Department argued for dismissal of this Respondent's

reconsideration motion.

2.3 The Presiding Officer concludes that there is no legal basis for a motion to reconsider a prehearing order. Reconsideration is provided only for final orders. WAC 246-11-580(1).

2.4 There are additional reasons to deny this reconsideration motion. First, the Respondent's arguments are a restatement of the issues already argued and ruled upon. Second, the Respondent's motion to compel production of documents is without grounds, because the Respondent has failed to provide evidence that such documentation was asked for during discovery. Third, the Respondent failed to show what specific information he is entitled to be placed under seal in a protective order. The assurance, that his anonymity would be maintained, which was made by an individual from DSHS, has no bearing in this disciplinary matter before the Department of Health/Board of Pharmacy. Fourth and finally, the Respondent's Motion for Reconsideration of Prehearing Order No. 7 was filed after the motion filing deadline.

2.5 The Presiding Officer concludes and hereby DENIES the Respondent's Motion for Reconsideration of Prehearing Order No. 7 Re: Denial of Motion to Suppress and Prehearing Order No. 8, Re: Denial of Motion to Compel.

B. Respondent's Motion for Reconsideration Prehearing Order No. 5 and Prehearing Order No. 8.

2.6 On February 8.2008. the Respondent filed

a Motion for Reconsideration of Prehearing Order No. 5, Re: Denial of Motion to Suppress and Prehearing Order No. 8, Re: Denial of Motion to Compel. The Respondent moved again for suppression of the Respondent's alleged Statement dated March 21, 2006, because he argued it was illegally obtained. The Respondent again requested that the Presiding Officer grant his motion to compel.

2.7 On February 8, 2008, the Department filed a Response to Respondent's Motion for Reconsideration of Prehearing Order No. 5 and Prehearing Order No. 8. The Department requested that the Respondent's motion for reconsideration of these two prior prehearing orders be denied.

2.8 The Presiding Officer concludes that there is no legal basis for a motion to reconsider these two prehearing orders. Reconsideration is provided only for final orders. WAC 246-11-580(1).

2.9 There are additional reasons for denying this motion. First, the Respondent's arguments for suppression of evidence (Prehearing Order No. 5) and his arguments to compel production of documents (Prehearing Order No. 8) were again a restatement of the issues already argued and ruled upon. Second, the Respondent had his opportunity to refute Department's contention that it provided all documents requested during discovery. *See* Declaration of AAG Gideon in Support of Department's Response and Objections to Respondent's Motion to Compel, signed January 9, 2008, Attachment Exhibit 5. Third and finally, the Respondent's reconsideration motion of Prehearing Order No. 5 and Prehearing Order No. 8 were filed

after the motion filing deadline.

2.10 The Presiding Officer concludes and hereby DENIES Respondent's Motion for Reconsideration of Prehearing Order No. 5, Re: Denial of Motion to Suppress and Prehearing Order No. 8, Re: Denial of Motion to Compel.

III. ORDER ON CONDUCT AT HEARING

3.1 On February 11, 2008, the Presiding Officer conducted a prehearing conference and reviewed matters in preparation for the hearing. After the prehearing conference and consideration of the Department's Prehearing Statement and Respondent's Prehearing Memorandum, the Presiding Officer issues this Order on the conduct at the hearing.

3.2 Issues at Hearing. The Presiding Officer concludes that there are two issues for the hearing:

A. Did the Respondent's conduct that has been alleged in the Statement of Charges constitute unprofessional conduct under RCW 18.130.180(1), (6), (7) and (13), RCW 18.64.160(3), and RCW 69.41.010(5)?

B. If the Respondent engaged in unprofessional conduct, then what sanction(s) as authorized by RCW 18.130.160 should be imposed?

During the hearing, the Respondent plans to argue in his defense that (1) that the Respondent was granted immunity and (2) the evidence should be suppressed because it was illegally gathered from involuntary statements.

3.3 The Presiding Officer ORDERS that the Respondent has the burden to prove the affirmative defense that an oral immunity agreement was granted to him by the Board of Pharmacy. The Presiding Officer ruled on and issued Conclusions of Law on this issue. *See* Prehearing Order No. 5: Order on Respondent's Motion to Suppress, Paragraphs 3.2 through 3.9. *See also* Prehearing Order No. 7: Order Denying Respondent's Motion to Dismiss, Paragraph 3.8.

3.4 The Presiding Officer ORDERS that the Respondent shall be precluded from arguing that the Whistleblower Statutes prevents the Board from finding that the Respondent acted unprofessionally. The Presiding Officer ruled on and issued conclusions of law on this issue. *See* Prehearing Order No. 7: Order Denying Respondent's Motion to Dismiss, Paragraphs 3.10 through 3.13.

3.5 The Presiding Officer ORDERS that the Respondent shall be precluded from arguing any alleged immunity agreement with the federal prosecutor and Department of Social and Health Services Investigator apply to this proceeding. The Presiding Officer ruled on and issued Conclusions of Law on this issue. *See* Prehearing Order No. 5, Paragraph 3.11. *See also Deathridge v. Board of Psych.*, 134 Wn.2d 131 (1997).

3.6 Standard of Proof. The Washington Supreme Court held that the constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence. *Ongom v. Dept. of Health*, 159 Wn. 2d 132 (2006), *cert. denied* 127 S. Ct. 2115 (April 2007).

3.7 Discovery and Sanctions. On December 3, 2007, the Respondent failed to appear at a scheduled deposition requested by the Department. On November 28, 2007, the Presiding Officer had issued an order denying the Respondent's Motion to Quash the Department's Notice of Deposition scheduled for December 3, 2007. *See* Prehearing Order No. 2: Order Denying Motion to Quash.

3.8 On January 9, 2008, the Presiding Officer granted the Department's Motion for Sanctions and ordered the Respondent to comply with an amended Notice of Deposition. The Presiding Officer concluded that the Respondent willfully interfered with the progress of this proceeding. *See* Prehearing Order No. 6: Order on Department's Motion for Sanctions, Paragraphs 3.6 and 3.7.

3.9 In addition, after being subpoenaed for a second time and after the Presiding Officer issued an order denying the Respondent's Motion to Quash, the Respondent again failed to appear for a scheduled deposition on February 4, 2008. The Presiding Officer addressed the Respondent's claims to assert at a deposition, his Fifth Amendment privilege against self-incrimination and right to remain silent. The Respondent should have appeared and claimed whatever privilege he believes to be the basis for not answering each and every question posed to him.

3.10 By failing to appear at the Respondent's second scheduled deposition, the Presiding Officer again concludes that the Respondent has willfully interfered with the progress of these proceedings and appropriate sanctions should be ordered. WAC 246-11-170. By failing to appear at two scheduled

depositions, the Respondent has interfered with the Department's efforts to obtain discovery information. It is prejudicial to the Department that the Respondent refused to appear for a deposition on the basis of Fifth Amendment privileges and then plans to appear at the hearing and testify about his immunity claims and about the illegality of the Department's conduct. The Presiding Officer ORDERS that the Respondent shall not be allowed to testify on his behalf in order to present evidence that Department was prevented from discovering at his depositions. This would include testimony regarding his claims of immunity or testimony regarding alleged illegally obtained information and evidence.

3.11 Witnesses. Any witness not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding absent good cause. WAC 246-11-390(8).

3.12 The Department plans to call the Respondent and Stan Jeppesen. These two witnesses shall be permitted to testify at the hearing. WAC 246-11-390(8).

3.13 At the hearing, the Respondent plans to assert his right to not testify due to his Fifth Amendment privilege against self-incrimination and right to remain silent. The Presiding Officer ORDERS that the Board shall be entitled to draw an adverse inference when the Respondent refuses to answer a question on the grounds that it might incriminate him. The Presiding Officer ruled on and issued Conclusions of Law on this issue. *See* Prehearing Order No. 2: Order Denying Motion to Quash, Paragraphs 2.8 through 2.17; Prehearing Order No. 4: Order Denying

Motion for Reconsideration of Prehearing Order No. 2, Paragraph 2.3, and Prehearing Order No. 5: Order on Department Motion for Sanctions, Paragraph 3.5.

3.14 In his defense, the Respondent plans to call J. Timothy Hinckley and Kelly M. McLean. These two witnesses shall be permitted to testify at the hearing. WAC 246-11-390(8).

3.15 The Respondent requests that the Presiding Officer issue a subpoena requiring J. Timothy Hinckley to appear and to testify. In this case, it is not necessary for the Presiding Officer to issue a subpoena for the following five reasons. First, the Respondent's counsel has already attempted to issue a subpoena and the United States Department of Human and Health Services (DHHS). DHHS determined Mr. Hinckley's testimony would not promote the objectives of its agency. Second, it was determined that Mr. Hinckley's participation, in this Board of Pharmacy proceeding may endanger an existing, open criminal investigation. Third, it was determined that the Washington State Board of Pharmacy does not have jurisdiction over the federal DHHS. Fourth, there was no showing that the Respondent, as required by DHHS, submitted a request to the agency head of DHHS to state the nature of the requested testimony, why it cannot be obtained from other sources, and reasons for the testimony. This would be the Respondent's appropriate avenue to obtain Mr. Hinckley's testimony.

3.16 Finally, the fifth reason, the Respondent has failed to identify the necessity for this federal employee to testify in this disciplinary hearing.

Moreover, the Respondent has failed to show the relevance of Mr. Hinckley's testimony. WAC 246-11-480(2)(d). The Presiding Officer ruled on and issued conclusions of law on the issue of whether an alleged immunity agreement with the federal prosecutor can apply to this disciplinary proceeding. *See* Paragraph 2.5 above. Further, pursuant to the Scheduling Order, the discovery completion date was January 11, 2008. The hearing is not the time and place for discovery to be conducted regarding Mr. Hinckley's testimony.

3.17 Exhibits. Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding absent good cause. WAC 246-11-390(7).

3.18 Department's Exhibits. In this case, the Department offered four exhibits for the hearing:

Department's Exhibit No. 1: Respondent's Written Statement Notice, dated March 16, 2006.

Department's Exhibit No. 2: Respondent's Written Statement, dated March 21, 2006.

Department's Exhibit No. 3: Zyprexa Prescription Summary (14 prescriptions): A-Z pharmacy & Medical Supply/ Eli Lilly and Company.

Department's Exhibit No. 4: Zyprexa Prescriptions.

3.19 Objections to Department's Exhibits. The Respondent objected to the Department's exhibits. The Respondent objected to any statements attributed to Timothy Hinckley and/or Peter Winn because of lack of authenticity, hearsay, and obtained without compliance with federal agency rules. The Respondent objected to the Respondent's statements because they were given involuntarily under the grant of immunity,

and were obtained without proper legal authority (fruits of the poisonous tree). Further, the Respondent objected to the Department's exhibits because the documents are not originals, lack authentication, lack proof of chain of custody, and lack proper foundation.

3.20 The Presiding Officer concludes that all oral and written statements made by the Respondent that are against his interest are admissible in this proceeding under RCW 34.05.452 and ER 801(d)(2). The exhibits are relevant. ER 401; ER 402. Further, the Presiding Officer has already addressed the Respondent's objection to suppress the Department's exhibits. *See* Prehearing Order No. 5: Order on Respondent's Motion to Suppress. Thus, the Department's Exhibits Nos. 1-4 shall be admitted at the hearing after proper foundation is provided.

3.21 Respondent's Exhibits. In this case, the Respondent offered eight exhibits for the hearing:

Respondent's Exhibit No.1: Printout of e-mail correspondence from February 8 and 9, 2004, to the Respondent from Troy Parks and Teresa Wiggerhaus.

Respondent's Exhibit No. 2: List of telephone numbers.

Respondent's Exhibit No. 3: E-mail correspondence dated August 25, 2004 from DSHS Troy Parks to Cory Johnson, Dwain Sparrowk and Timothy Hinckley.

Respondent's Exhibit No. 4: Investigative Memorandum, by Stan Jeppesen, March 7, 2005; Re: AZ Pharmacy

Respondent's Exhibit No. 5: Meeting Notes, December 21, 2004.

Respondent's Exhibit No. 6: Letter from Diane

Cruz-Burke to Timothy Hinckley, dated December 11, 2006.

Respondent's Exhibit No. 7: Memorandum from Stan Jeppesen to Joseph Amedson, dated July 6, 2007, Re: Personal Statement.

Respondent's Exhibit No. 8: Letter .from Timothy Menke to Rhys Sterling, dated September 6, 2006, Re: Joseph Amedson.

3.22 Objections to the Respondent's Exhibits. The Department objected to Respondent's exhibits, except for the Respondent's Exhibit No. 7. The Department argued that these exhibits are not relevant to this matter. Regarding the Respondent's Exhibit No. 5, the Department argued that the document was both incomplete (unidentified) and not relevant.

3.23 The Presiding Officer orders that the Respondent's Exhibits Nos. 1, 2, 3, and 8 shall not be admitted. The exhibits are communications, or evidence of communications, between the Respondent and DSHS and federal representatives. The documents are not relevant to this disciplinary hearing. They provide no proof of whether the alleged unprofessional conduct was more probable or less probable. ER 402. Even if relevant, the relevancy is outweighed by the danger of confusion of the issues. ER 403. The Presiding Officer ruled on and issued Conclusions of Law on this issue regarding alleged immunity by the federal prosecutor and promises by individuals from DSHS. *See* Prehearing Order No. 5, Paragraph 3.11.

3.24 Respondent's Exhibit No. 4 is an investigation report related to an investigation

conducted about AZ Pharmacy. The report describes the conduct that occurred at AZ pharmacy, where the Respondent was employed, and where the Respondent's alleged unprofessional conduct occurred. This exhibit is relevant regarding the issue of sanctions and, if it so elects, the Department can question Mr. Jeppesen when he testifies. The Respondent's Exhibit No. 4 shall be admitted.

3.25 The Respondent's Exhibit No. 5 is a collection of facts taken from a meeting on December 21, 2004. There is no showing who wrote these notes or who provided the information for each of the facts set forth in the notes. Even if the notes had relevancy, the relevancy is outweighed by the danger of confusion of the issues. ER 403. Further, due to the collection of facts as written, there is no possibility that a foundation for this exhibit could be established. The Respondent's Exhibit No. 5 shall not be admitted.

3.26 The Respondent's Exhibit No. 6 is a letter between an Inspector General and an associate general counsel from Eli Lilly and Company. This document provides no proof of whether the alleged unprofessional conduct was more probable or less probable. ER 402. Even if relevant, the relevancy is outweighed by the danger of confusion of the issues. ER 403. The Respondent's Exhibit No. 6 shall not be admitted.

3.27 The Respondent's Exhibit No. 7 is a communication between Stan Jeppesen and the Respondent. There was no objection, and the letter has some relevancy to the issue of sanctions and the Respondent's argument that he was cooperating with a federal investigation. The Respondent's, Exhibit No.

7 shall be admitted.

3.28 Procedural Notebook. At the hearing, the Presiding Officer will provide for each panel member a procedural notebook, which shall include the Statement of Charges and the Respondent's first Amended Answer to Statement of Charges, and Request for Adjudicative Proceeding and Formal Hearing.

3.29 Admission of Pleadings. The Respondent requested to have the agency record provided to the panel during the hearing. The Department objected. The agency record includes any motions, filings, pleadings, briefs, petitions, requests, and rulings. WAC 246-11-590. If a party seeks to appeal this matter, then the entire agency record along with the exhibits shall be forwarded to superior court. WAC 246-11-590 and WAC 246-11-600(3). At the hearing, the testimony from witnesses and the admitted exhibits shall be provided to the Board as evidence. WAC 246-11-490 and RCW 34.05.452. The Respondent's request to have the agency record provided as evidence to the panel at the hearing is DENIED.

3.30 Relief Requested. The Department requested that the Board affirm the violations alleged in the Statement of Charges and impose the appropriate sanctions. The Respondent requested that the charges be dismissed.

3.31 Hearing Date. The hearing is scheduled for **March 7, 2008, commencing at 9:00 a.m.** The Adjudicative Service Unit shall issue a Notice of Hearing, providing the hearing address.

3.32 Order Defining Conduct at Hearing. The

presiding officer shall conduct prehearing conferences and shall issue rulings related to prehearing motions and evidentiary issues. The rulings by the presiding officer shall govern the conduct at subsequent proceedings. WAC 246-11-390(3) and (5). The orders. made by the Presiding Officer stated above in this Order shall govern the conduct of the parties at subsequent proceedings, unless modified by an order of the Presiding Officer.

Dated this 25th day of February, 2008.

s/ Arthur E. DeBusschere
ARTHUR E. DeBUSSCHERE
Health Law Judge, Presiding Officer

Declaration Of Service By Mail

I declare that today I served a copy of this document upon the following parties of record: RHYS A. STERLING, ATTORNEY AT LAW AND CINDY C. GIDEON, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 25th DAY OF FEBRUARY, 2008.

s/ Bruce Bronoske, Jr.
Adjudicative Service Unit
cc: JANELLE TEACHMAN
PATRICK HANLEY, JR.
FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 2006-02-0001

APPENDIX N

UNITED STATES CONSTITUTION

Article III

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme court and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; --to all cases affecting ambassadors, other public ministers and consuls; --to all cases of admiralty and maritime jurisdiction; --to controversies to which the United States shall be a party; --to controversies between two or more states; --between a state and citizens of another state; --between citizens of different states; --between citizens of the same state claiming land under grants of differ-ent states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall

be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within an state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3.

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, support-ed by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein

they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer

of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

UNITED STATES CODE

28 U.S.C. § 1257 State courts; certiorari

(Pub. L. 100-352, Sec. 3, June 27, 1988, 102 Stat. 662)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

* * *

STATE OF WASHINGTON STATUTES AND RULES

RCW 18.130.095
Uniform procedural rules

(1)(a) The secretary, in consultation with the disciplining authorities, shall develop uniform procedural rules to respond to public inquiries concerning complaints and their disposition, active investigations, statement of charges, findings of fact, and final orders involving a license holder, applicant, or unlicensed person. The uniform procedural rules adopted under this subsection apply to all adjudicative proceedings conducted under this chapter and shall include provisions for establishing time periods for

initial assessment, investigation, charging, discovery, settlement, and adjudication of complaints, and shall include enforcement provisions for violations of the specific time periods by the department, the disciplining authority, and the respondent. A license holder must be notified upon receipt of a complaint, except when the notification would impede an effective investigation. At the earliest point of time the license holder must be allowed to submit a written statement about that complaint, which statement must be included in the file. Complaints filed after July 27, 1997, are exempt from public disclosure under chapter 42.56 RCW until the complaint has been initially assessed and determined to warrant an investigation by the disciplining authority. Complaints determined not to warrant an investigation by the disciplining authority are no longer considered complaints, but must remain in the records and tracking system of the department. Information about complaints that did not warrant an investigation, including the existence of the complaint, may be released only upon receipt of a written public disclosure request or pursuant to an interagency agreement as provided in (b) of this subsection. Complaints determined to warrant no cause for action after investigation are subject to public disclosure, must include an explanation of the determination to close the complaint, and must remain in the records and tracking system of the department.

(b) The secretary, on behalf of the disciplining authorities, shall enter into interagency agreements for the exchange of records, which may include complaints filed but not yet assessed, with other state agencies if access to the records will assist those

agencies in meeting their federal or state statutory responsibilities. Records obtained by state agencies under the interagency agreements are subject to the limitations on disclosure contained in (a) of this subsection.

(2) The uniform procedures for conducting investigations shall provide that prior to taking a written statement:

(a) For violation of this chapter, the investigator shall inform such person, in writing of: (i) The nature of the complaint; (ii) that the person may consult with legal counsel at his or her expense prior to making a statement; and (iii) that any statement that the person makes may be used in an adjudicative proceeding conducted under this chapter; and

(b) From a witness or potential witness in an investigation under this chapter, the investigator shall inform the person, in writing, that the statement may be released to the license holder, applicant, or unlicensed person under investigation if a statement of charges is issued.

(3) Only upon the authorization of a disciplining authority identified in RCW 18.130.040(2)(b), the secretary, or his or her designee, may serve as the presiding officer for any disciplinary proceedings of the disciplining authority authorized under this chapter. The presiding officer shall not vote on or make any final decision in cases pertaining to standards of practice or where clinical expertise is necessary. All functions performed by the presiding officer shall be subject to chapter 34.05 RCW. The secretary, in consultation with the disciplining authorities, shall adopt procedures for implementing this subsection.

(4) The uniform procedural rules shall be adopted by all disciplining authorities listed in RCW 18.130.040(2), and shall be used for all adjudicative proceedings conducted under this chapter, as defined by chapter 34.05 RCW. The uniform procedural rules shall address the use of a presiding officer authorized in subsection (3) of this section to determine and issue decisions on all legal issues and motions arising during adjudicative proceedings.

RCW 34.05.440
Default

(1) Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding, and the agency may proceed to resolve the case without further notice to, or hearing for the benefit of, that party, except that any default or other dispositive order affecting that party shall be served upon him or her or upon his or her attorney, if any.

(2) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.

(3) Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party

against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of that party, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

RCW 34.05.470
Reconsideration

(1) Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The place of filing and other procedures, if any, shall be specified by agency rule.

(2) No petition for reconsideration may stay the effectiveness of an order.

(3) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration. The agency is deemed to have denied the petition for reconsideration if, within twenty days from the date the petition is filed, the agency does not either: (a) Dispose of the petition; or (b) serve the parties with a written notice specifying the date by which it will act on the petition.

(4) Unless the petition for reconsideration is deemed denied under subsection (3) of this section, the petition shall be disposed of by the same person or

persons who entered the order, if reasonably available. The disposition shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further hearing.

(5) The filing of a petition for reconsideration is not a prerequisite for seeking judicial review. An order denying reconsideration, or a notice provided for in subsection (3)(b) of this section is not subject to judicial review.

RCW 34.05.534
Exhaustion of administrative remedies

A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review, except:

(1) A petitioner for judicial review of a rule need not have participated in the rule-making proceeding upon which that rule is based, have petitioned for its amendment or repeal, have petitioned the joint administrative rules review committee for its review, or have appealed a petition for amendment or repeal to the governor;

(2) A petitioner for judicial review need not exhaust administrative remedies to the extent that this chapter or any other statute states that exhaustion is not required; or

(3) The court may relieve a petitioner of the requirement to exhaust any or all administrative

remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile; or (c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

WAC 246-11-390
Prehearing conference

(1) If a scheduling order is issued, the parties shall be notified of the time and place of the first prehearing conference in the scheduling order. If another scheduling mechanism is issued, a prehearing conference will be held upon motion of either party, unless board policy provides otherwise.

(2) The presiding officer shall determine whether the prehearing conferences will be conducted in person or by telephone conference call.

(3) The presiding officer shall conduct the prehearing conference and shall issue rulings related to prehearing motions and evidentiary issues. The rulings shall govern the conduct of subsequent proceedings.

(4) The prehearing conference may be recorded as ordered by the presiding officer. All offers of proof and objections concerning matters raised at the prehearing conference must be made on the record at the prehearing conference.

(5) Following the final prehearing conference, the presiding officer shall issue a written prehearing order which will:

(a) Identify the issues to be considered at the hearing and indicate which party has the burden of proof on these issues;

(b) Specify the facts which are admitted or not contested by the parties;

(c) Identify those documents and exhibits that will be admitted at hearing and those which may be distributed prior to hearing;

(d) Identify expert and lay witnesses that may be called at hearing and the issues to which those witnesses may testify;

(e) Rule on motions;

(f) Accept amendments to the pleadings;

(g) Address such other issues or matters as may be reasonably anticipated to arise and which may aid in the disposition of the proceedings; and

(h) Rule on objections made in any preserved testimony.

(6) Following the prehearing conference, the presiding officer may issue an order directing that the matter be heard as a brief adjudicative proceeding, pursuant to WAC 246-11-420 through 246-11-450.

(7) Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding in the absence of a clear showing that the offering party had good cause for failing to produce the evidence at the prehearing conference.

(8) Witnesses not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding in the absence of a clear showing that the party offering the testimony of such witness had good cause for failing to identify the

witness at the prehearing conference.

(9) If the authenticity of documents submitted at the prehearing conference is not challenged at the prehearing conference, the documents shall be deemed authentic. However, a party shall be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to object at the prehearing conference.

(10) Nothing in these rules shall prohibit the presiding officer from conducting a conference at any time, including during the hearing. The presiding officer shall state on the record the results of such conference.

(11) A party bound by a stipulation or admission of record may withdraw it in whole or in part only upon a determination by the presiding officer or hearing officer that:

(a) The stipulation or admission was made inadvertently or as a bona fide mistake of fact or law; and (b) The withdrawal will not unjustly prejudice the rights of the other parties.

(12) In an appeal to superior court involving issues addressed in the prehearing order, the record of the prehearing conference, written motions and responses the prehearing order and any orders issued by the presiding officer pursuant to WAC 246-11-380, shall be the record.

WAC 246-11-480
Conduct of adjudicative proceeding

(1) The adjudicative proceeding shall be conducted as provided in RCW 34.05.449 through

34.05.455.

(2) The presiding officer may take the following actions to the extent not already determined in a prehearing order:

(a) Conduct the hearing de novo;

(b) Determine the order of presentation of evidence;

(c) Administer oaths and affirmations;

(d) Issue subpoenas;

(e) Rule on procedural matters, objections, motions, and offers of proof;

(f) Receive relevant evidence;

(g) Interrogate witnesses called by the parties in an impartial manner to develop any facts necessary to fairly and adequately decide the matter;

(h) Call additional witnesses and request additional exhibits deemed necessary to complete the record and receive such evidence subject to full opportunity for cross-examination and rebuttal by all parties;

(i) Take any appropriate action necessary to maintain order during the adjudicative proceeding;

(j) Determine whether to permit or require oral argument or briefs and determine the time limits for submission thereof;

(k) Permit photographic and recording equipment at hearing subject to conditions necessary to preserve confidentiality and prevent disruption;

(l) Permit a person to waive any right conferred upon that person by chapter 34.05 RCW or this chapter, except as precluded by law; and

(m) Take any other action necessary and authorized by applicable law or rule.

(3) The presiding officer shall:

(a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;

(b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules, and court decisions; and

(c) Not declare any statute or rule invalid.

(4) If the validity of any statute or rule is raised as an issue, the presiding officer may permit arguments to be made on the record concerning the issue for the purpose of subsequent review.

(5) Members of the board hearing the matter may ask questions of any witness and may call additional witnesses.

(6) A party may move to disqualify the presiding officer or any member of the board pursuant to RCW 34.05.425(3).

WAC 246-11-580
Reconsideration of final orders

(1) Within ten days of service of a final order, either party may file a petition for reconsideration, stating the specific grounds upon which reconsideration is requested and the relief requested.

(2) Grounds for reconsideration shall be limited to: (a) Specific errors of fact or law; or

(b) Implementation of the final order would require department activities inconsistent with current department practice; or

(c) Specific circumstances render the person requesting the reconsideration unable to comply with the terms of the order.

(3) Petitions for reconsideration must be served upon the opposing party and filed with the adjudicative clerk office within ten days of service of the final order.

(4) If reconsideration is requested based on an error of fact, the request for reconsideration shall contain specific reference to the record. If reconsideration is requested based on testimony of record, the request for reconsideration shall contain specific reference to the testimony. The presiding officer may require that the party requesting reconsideration submit a copy of the transcript of the adjudicative proceeding and provide specific reference to the transcript.

(5) The petition for reconsideration is denied if, within twenty days of the date the petition is filed, the presiding officer:

(a) Denies the petition;

(b) Does not act upon the petition; or

(c) Does not serve the parties with notice of the date by which he/she will act on the petition.

(6) If the presiding officer determines to act upon the petition, the opposing party shall be provided at least ten days in which to file a response to the petition.

(7) Disposition of petitions for reconsideration shall be in the form of a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings.

WAC 246-11-610
Vacating an order for reason of default or withdrawal

(1) A party may petition to vacate a default order entered against that party for failing to attend an adjudicative proceeding requested by that party by:

(a) Specifying the grounds relied upon in the petition; and

(b) Filing the petition at the adjudicative clerk office within seven days of service of the default order.

(2) The presiding officer shall consider the petition and shall:

(a) Grant the motion to vacate and reinstate the application for adjudicative proceeding, and may impose conditions on licensure pending final adjudication; or

(b) Deny the motion to vacate the default order.

RULE ON APPEAL (RAP) 12.1
BASIS FOR DECISION

(a) Generally. Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.

(b) Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

APPENDIX O

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of the Credential to to Practice as a Pharmacist of:	)	Docket No. 07-04-A-1080PH
	)	AMEDSON'S RESPONSE AND OBJECTION TO AND MOTION FOR RECONSIDERATION OF PREHEARING ORDER NO. 10 **AND** NOTICE OF INTENT NOT TO ATTEND HEARING AS PROTEST TO CONSTRAINTS UNDER PREHEARING ORDER NO. 10
JOSEPH R. AMEDSON, R.Ph., Credential No. PH00011607,	)	
Respondent	)	

In accordance with and pursuant to WAC 246-11-390(12), WAC 246-11-380(1), WAC 10-08-130(3), RCW 34.05.449(1), and Paragraph 3.32 of Prehearing Order No. 10 dated February 25, 2008, Respondent /Defendant Joseph R. Amedson hereby submits and files his response and objection to and motion for reconsideration of Prehearing Order No. 10: Order On Motions And Order On Conduct At Hearing, **AND** his notice of intent not to attend the adjudicative hearing in this action in person as protest to the unconstitutional and impermissible constraints imposed by Prehearing Order No. 10.

I. AMEDSON'S PLEADINGS AND MOTIONS INCLUDED AND INCORPORATED BY REFERENCE INTO THIS RESPONSE AND OBJECTION

Amedson's pleadings and motions that are included and incorporated by reference in full into this response and objection to and motion for reconsideration of, and which provide the factual and legal bases for reconsideration and judicial review of, Prehearing Order No. 10 are each of the following:

1. Amedson's Motion To Quash Department's Notice Of Deposition And Subpoena Duces Tecum, And For Entry Of Protective Order, and any attachments/Declarations attached thereto, filed and served by mail on November 5, 2007.

2. Amedson's Motion In Limine to Suppress Oral and Written Statements And to Exclude All Resulting Fruit of the Poisonous Tree, and any attachments/Declarations attached thereto, filed and served by mail on November 15, 2007.

3. Amedson's First Amended Answer To Statement Of Charges, And Request For Adjudicative Proceeding And Formal Hearing, and any attachments /Declarations attached thereto, filed and served by mail on November 16, 2007.

4. Amedson's Reply to Department's Response and Objection to Motion to Quash, and any attachments/Declarations attached thereto, filed and served by mail on November 20, 2007.

5. Amedson's Exhibit List And Answer To Subpoena Duces Tecum, and any attachments/Declar-

ations attached thereto, filed and served by mail on November 27, 2007.

6. Amedson's Motion For Reconsideration Of Prehearing Order No. 2 Denying Motion To Quash, and any attachments/Declarations attached thereto, filed and served by mail on November 29, 2007.

7. Amedson's Reply Brief On Motion In Limine To Suppress And Motion To Strike And Motion To Compel, and any attachments/ Declarations attached thereto, filed and served by mail on December 8, 2007.

8. Amedson's Response To Department's Motion For Sanctions, and any attachments/Declarations attached thereto, filed and served by mail on December 10, 2007.

9. Amedson's Motion To Dismiss With Prejudice the Board's Statement of Charges on Grounds of Immunity, and any attachments/Declarations attached thereto, filed and served by mail on December 17, 2007.

10. Amedson's Reply Brief on Motion to Dismiss **And** Motion to Strike, and any attachments/ Declarations attached thereto, filed and served by mail on December 28, 2007.

11. Amedson's letter of intent to file a Motion for Reconsideration of Prehearing Order No. 5: Order On Respondent's Motion To Suppress (dated January 2, 2008 and received by mail on January 4, 2008) promptly following the issuance of/compliance regarding the Presiding Officer's ruling on his Motion to Compel (see Prehearing Order No. 5, at Page 8, ¶ 3.12, and at Page 9, ¶ 5.3), and any attachments/ Declarations attached thereto, filed and served by mail on January 4, 2008.

12. Amedson's Reply to Department's Response to Motion to Compel, and any attachments/Declarations attached thereto, filed and served by mail on January 10, 2008.

13. Amedson's Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions, and any attachments/Declarations attached thereto, filed and served by mail on January 14, 2008.

14. Amedson's Reply to Department Response to Motion for Reconsideration of Prehearing Order No. 6 Re: Sanctions And Motion to Quash, and any attachments/ Declarations attached thereto, filed and served by mail on January 23, 2008.

15. Amedson's Motion for Reconsideration of Prehearing Order No. 7 Re: Denial of Motion to Dismiss And Clarification of Motion for Confidentiality, and any attachments/Declarations attached thereto, filed and served by mail on January 30, 2008.

16. Amedson's Prehearing Memorandum, and any attachments/Declarations attached thereto, filed and served by mail on February 4, 2008.

17. Amedson's Motion for Reconsideration of Prehearing Order No. 5 re: Denial of Motion to Suppress **And** Prehearing Order No. 8 re: Denial of Motion to Compel, and any attachments/Declarations attached thereto, filed and served by mail on February 6, 2008.

18. Amedson's Response To Department's Motion For Sanctions Set Forth In Its Prehearing Memorandum, and any attachments/Declarations attached thereto, filed and served by mail on February 7, 2008.

II. SPECIFIC OBJECTIONS TO PREHEARING ORDER NO. 10

Amedson specifically and expressly objects to each of the following parts of Prehearing Order No. 10 on grounds including but not limited to those set forth hereinbelow:

1. Paragraph 1.5 with respect to Prehearing Order Nos. 2, 4, 5, 6, 7, 8, and 9. For the legal and factual reasons set forth in each of Amedson's underlying motions and briefs, and reconsideration thereof, each of these Orders is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious.

2. Paragraph 2.3. Nowhere in applicable statutes and regulations is there any specific or express prohibition as to a party filing a motion for reconsideration of a prehearing Order entered by the Presiding Officer. Timely motions for reconsideration are an appropriate and proper legal means of seeking review of any Order on grounds that such was in some manner and reason erroneous. Reconsideration is

appropriate under circumstances "where the court has obviously misapprehended a party's position or the facts or the law."[1] A motion for reconsideration should thus be considered to be a type of "motion" under and pursuant to WAC 246-11-380(1).

3. Paragraph 2.4. Denying a motion for reconsideration on grounds that such is purportedly but "a restatement of the issues already argued and ruled upon" is legally improper.[2] Furthermore, Amedson did in fact clearly demonstrate that the documents demanded to be produced by his motion to compel were in fact covered by and included in the scope of the Subpoena Duces Tecum previously issued to Stanley Jeppesen, and that such were not produced as demanded. Amedson clearly sought a protective order shielding all documents and information in this action from disclosure as a public record on grounds that the State had promised him anonymity in the A-Z Pharmacy matter and his well founded fear and concern for his and his family's safety. Finally, a motion for reconsideration should be found to be

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[1] Anderson v. United Auto Workers, 738 F. Supp. 441, 442 (D.Kan. 1990). Reconsideration is likewise appropriate to correct a clear error of law or fact or to prevent a manifest injustice. Bryan v. Shah, 351 F. Supp. 2d 295, 297 (D.N.J. 2005).

[2] A party is entitled to reconsideration where the court has overlooked controlling law or material facts. Interfaith Community Organization v. Honeywell International, 215 F. Supp. 2d 482, 507 (D.N.J. 2002); Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000) ("To be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.")

timely where it is promptly filed after receipt of an Order that itself was issued subsequent to the motion deadline.[3]

4. Paragraph 2.5. For the legal and factual reasons set forth in each of Amedson's original underlying motions and reconsideration thereof, the Presiding Officer's denial of Amedson's motion for reconsideration of Prehearing Order No. 7 re: denial of motion to dismiss and clarification of motion for confidentiality[4] is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious.

5. Paragraph 2.8. Same grounds as set forth in #2 above.

6. Paragraph 2.9. Same grounds as set forth in #3 above.

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[3] So long as the original motion was timely filed by the deadlines established in the Scheduling Order, the prompt reconsideration of an Order ruling on such motion must be held timely as well. Cf. WAC 246-11-380(2).

[4] Note that the scope of the express denial set forth in Paragraph 2.5 is inconsistent with the subject matter identified in Paragraph 2.1.

7. Paragraph 2.10. For the legal and factual reasons set forth in each of Amedson's original underlying motions and reconsideration thereof, the Presiding Officer's denial of Amedson's motion for reconsideration of Prehearing Order No. 5 re: denial of motion to suppress and Prehearing Order No. 8 re: denial of motion to compel is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is inconsistent with applicable agency rules, and/or is arbitrary and capricious.

8. Paragraph 3.2. Amedson objects to the limitation on issues for the hearing. The identification of issues for resolution at the hearing is materially incomplete, as the Board has been precluded from determining as the ultimate fact finder and decision-maker the additional fundamental issues raised and supported both legally and factually by Amedson in his Prehearing Memorandum.[5] The preclusion of

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[5] The issues presented by Amedson in his Prehearing Memorandum for determination by the Board are: (1) whether this quasi-criminal professional license disciplinary action against Amedson as the Defendant must be dismissed on grounds of immunity given to Amedson from such action?; (2) whether proffered evidence by the Department must be suppressed or

(continued...)

these issues for determination by the Board substantially prejudices Amedson, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial omission of issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious.

9. Paragraph 3.3. Objection is made to the

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[5](...continued)
otherwise limited as obtained involuntarily under grant of immunity, and any reference to or use thereof violates Amedson's constitutional rights and privileges and is a breach of immunity?; (3) whether any alleged oral and/or written confession, admission or statement purported by Amedson was involuntary under grant of immunity, or otherwise invalid and inadmissible by failure of the Board investigator(s) and/or others to fully comply with the mandatory written notice requirements of RCW 18.130.095(2)(a), or otherwise obtained in violation of due process or any other constitutional rights and privileges that were not voluntarily, knowingly and intelligently waived or relinquished by Amedson?; (4) whether any remaining and competent evidence proves under the clear, cogent and convincing standard that it is highly probable that Amedson is guilty of unprofessional conduct?; and (5) if Amedson is found guilty of unprofessional conduct, what is the appropriate and just punishment to be imposed under law by the Board?

prior Orders referenced and any inference that Amedson has failed to present legally adequate proof of immunity from this Board action in his underlying motions regarding this issue. In his motions to dismiss and in limine to suppress, Amedson met his burden of proving by the preponderance of the competent evidence that in exchange for his cooperation in the A-Z Pharmacy investigation that he would be safe from any Board action against him for anything discovered during such investigation. It was in good faith and justifiable reliance on such expressly promised immunity that Amedson cooperated with federal and State investigators, which cooperation allegedly included his attesting to certain statements in contravention of his Fifth Amendment and Wash. Const. art. I, § 9, rights and privileges. Such written statements cannot be used against Amedson in this action as they (1) are contrary and in breach of the grant of immunity, and (2) were obtained in violation of and undeniably without the Board's investigator complying with the express, mandatory requirements of RCW 18.130.095(2)(a). Because of such material breach of the immunity agreement by the Board's filing of and pursuing its Statement of Charges against him, Amedson has been forced to forcefully and in good faith assert all of his constitutional rights and privileges in this quasi-criminal action, including and not limited to the full scope of his Fifth Amendment privilege against self-incrimination and right to remain silent with absolutely no adverse inference raised thereby. Moreover, potentially corroborating witnesses are either unavailable, antagonistic, and/or suspiciously and very unwilling

and uncooperative to come forward to the point of being tainted. In addition to the grounds set forth in #1 above, imposing upon Amedson the burden of again proving immunity and then subsequently denying him the right to present testimony and evidence in an appropriate manner consistent with and with due deference to his Fifth Amendment rights and privileges is a violation of Amedson's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights and privileges and comparable provisions of Washington's Constitution and statutes.

10. Paragraph 3.4. The provisions and protections afforded Amedson under and pursuant to RCW 4.24.510 are applicable and grant to him statutory immunity from this Board action. In addition to the grounds set forth in #1 above, denying Amedson his right to invoke and seek protections under and pursuant to RCW 4.24.510 in a manner consistent with and with due deference to his Fifth Amendment rights and privileges is a violation of Amedson's Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights and privileges and comparable provisions of Washington's Constitution and statutes.

11. Paragraph 3.5. The express grant of immunity from federal prosecution confirmed by HHS SA Timothy Hinckley to Amedson's counsel is credible evidence and supports Amedson's assertion as to the concomitant grant of immunity from Board action, and is competent evidence to rebut and refute any equivocation or belated bald denials by Hinckley and/or Jeppesen. The grant of anonymity by State officials in DSHS is essential support underlying

Amedson's request for a protective order and nondisclosure of records and information in this action as public records. RCW 42.56.240(2). Moreover, potentially corroborating witnesses are either unavailable, antagonistic, and/or suspiciously and very unwilling and uncooperative to come forward to the point of being tainted. In addition to the grounds set forth in #1 above, denying Amedson his right to present evidence of grants of immunity and anonymity in a manner consistent with and with due deference to his Fifth Amendment rights and privileges is a violation of Amedson's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights and privileges and comparable provisions of Washington's Constitution and statutes.

12. Paragraph 3.7. The Orders referenced are, for the reasons cited in the related motions and briefs, including reconsideration, in violation of Amedson's well-established constitutional and statutory rights and privileges as the Defendant in this quasi-criminal action.

13. Paragraph 3.8. The Order referenced is, for the reasons cited in the related motions and brief, including reconsideration, in violation of Amedson's well-established constitutional and statutory rights and privileges as the Defendant in this quasi-criminal action and compulsory oral interrogation. Furthermore, reasonably asserting in good faith one's constitutional and statutory rights and privileges as grounds for noncompliance with an invalid Order is not as a matter of law willful interference with the progress of this proceeding or the willful refusal to

obey an Order.[6] Amedson reasonably and in good faith, and without waiving or relinquishing any of his constitutional and statutory rights and privileges, has offered to appropriately answer relevant written interrogatories from the Prosecutor as an alternative means of reasonable discovery.[7] This offer was declined by both the Presiding Officer and the Prosecutor. Moreover, the sole lawful remedy to enforce a Subpoena in this action is by and through the courts. RCW 34.05.588(1). The Department failed to exhaust its judicial remedies prior to the Presiding Officer imposing Draconian evidence and testimonial sanctions. Such unilateral administratively imposed sanctions are invalid, unlawful, and unconstitutional where the statutory remedy has not in any way been

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[6] "Intentional interference requires an improper objective . . . [and] exercising in good faith one's legal interests is not improper interference." Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). And a failure or refusal to comply with an order is "willful" only where there exists no "reasonable excuse or justification". Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002).

[7] In addition, Amedson has as mandated and without waiving or relinquishing any of his constitutional and statutory rights and privileges, supported motions with Declarations that clearly and fully present the facts relating and regarding his defense of immunity and the involuntariness of written and oral statements given under and pursuant to such immunity and the essential fact that he was not in writing apprised in any way that he was personally the subject of a Board investigation, the nature of the charges, and that any such alleged statements would be used against him and his license in a disciplinary action.

sought and exhausted.[8]

14. Paragraph 3.9. Same grounds as set forth in #13 above. The Presiding Officer has in this action previously and correctly found and concluded that (1) "Washington courts have continued to hold that a disciplinary proceeding is quasi criminal in nature";[9] and (2) "Washington law acknowledges that the Fifth Amendment privilege against self-incrimination applies to a quasi-criminal proceeding."[10] Here, it is critically important and fundamentally dispositive that Amedson is not but a mere witness, he is **the DEFENDANT** in this quasi-criminal action and thus has the full and blanket protections, rights and privileges afforded such individuals under the Fifth Amendment and Wash.

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[8] In re Mark A., 68 Cal.Rptr.3d 106 (Cal. App. 2007) (evidence and testimonial sanctions improper means of enforcing subpoena where Fifth Amendment invoked); Browne v. Commonwealth, 843 A.2d 429, 436 (Pa.Cmwlth. 2004) (a party has the responsibility to seek enforcement of a subpoena through the Commonwealth Court and waives any subsequent argument as to sanctions related to a party's noncompliance with the subpoena if application is not first made; see, e.g., 63 P.S. § 390-6(m)). In our case, the proper subpoena enforcing authority is the Superior Court and without first seeking judicial enforcement it is unlawful and an abuse of the administrative process for the Presiding Officer to make an end run around RCW 34.05.588(1) and unilaterally impose severe evidence and/or testimonial prohibitions against Amedson as a sanction in this quasi-criminal action.

[9] Prehearing Order No. 2, Conclusion 2.9.

[10] Prehearing Order No. 2, Conclusion 2.7.

Const. art. I, § 9.[11]

15. Paragraph 3.10. Same reasons as set forth in #13 and #14 above. The Presiding Officer has taken an end run around RCW 34.05.588(1) and unilaterally imposed substantial and severe evidence and testimonial sanctions against Amedson without the Department first exhausting its remedies by seeking enforcement of the Subpoena through the courts, and by erroneously concluding that Amedson's assertion and invocation of his Fifth Amendment rights and privileges as Defendant in this quasi-criminal action constitutes willful interference with this proceeding notwithstanding his standing offer to appropriately answer relevant written interrogatories, and further notwithstanding his Declarations fully presenting the facts regarding immunity and involuntariness of oral and written statements.[12] The

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[11] Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886); Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); State ex rel. Vining v. Florida Real Estate Commission, 281 So.2d 487 (Fla. 1973); State Bar of Michigan v. Woll, 194 N.W.2d 835 (Mich. 1972); City of Philadelphia v. Kenny, 369 A.2d 1343, 28 Pa. Commw. 531, 539 (Pa. Commw. Ct. 1977) (citing as authority United States v. United States Coin and Currency, 410 U.S. 715 (1971); Lees v. United States, 150 U.S. 476 (1893); Boyd, 116 U.S. 616 (1886); Osborne v. First National Bank, 26 A. 289 (Pa. 1893); Boyle v. Smithman, 23 A. 397 (1892)). Cf. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988) (privilege applies to all stages of the case).

[12] Under such circumstances and with the alternative means of discovery available but untaken, and with Amedson's Declarations already on file and part of the record in this action, the Department has failed to demonstrate how it has been prejudiced in this action and how Amedson has in fact interfered with the progress of this proceeding. WAC 246-11-170 is not the appropriate and lawful means and manner for imposing evidence (continued...)

option to testify is Amedson's choice alone to make under the Constitution and depends upon the circumstances and necessity. The Draconian sanctions imposed by the Presiding Officer against Amedson as Defendant in this quasi-criminal action in contemplation of such course substantially prejudices him to his material detriment in this action, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial bar omitting issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious.

16. Paragraph 3.12. Amedson in good faith and as Defendant in this quasi-criminal action asserts and invokes his full and blanket constitutional and statutory rights and privileges, including his privilege

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[12](...continued)
and testimonial sanctions against Amedson for the good faith and reasonable assertion and invocation of his rights and privileges under and pursuant to the Fifth Amendment and Wash. Const. art. I, § 9, in this quasi-criminal action against him as Defendant.

against self-incrimination and right to remain silent. Amedson cannot be called by the Prosecution in its case in chief. If an attempt is made, such is improper procedure and a violation of Amedson's constitutional rights and privileges, and he respectfully declines to be so compelled and subjected to oral interrogation by the Prosecutor.

17. Paragraph 3.13. The Orders referenced are, for the reasons cited in the related motions and briefs, including reconsideration, in violation of Amedson's well-established constitutional and statutory rights and privileges as the Defendant in this quasi-criminal action. The Presiding Officer's Order that the Board is entitled to draw an adverse inference from Amedson's assertion and invocation of his full constitutional rights and privileges to remain silent and not be subjected to compulsory oral interrogation of him by the Prosecutor in this quasi-criminal action is a clear, unequivocal and material violation of Amedson's constitutional rights and privileges and substantially and severely prejudices him as Defendant in this quasi-criminal action.[13] If Amedson was allowed and chose to offer testimony in his defense, he would nevertheless be subjected to limited cross-examination within the scope of his direct. However, if he chooses not to testify as is his constitutional right and privilege, no adverse inference may be implied or drawn whatsoever. It is clear and prejudicial error for the Presiding Officer to Order that

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[13] State Bar of Michigan v. Woll, 194 N.W.2d 835, 838 (Mich. 1972); City of Philadelphia v. Kenny, 369 A.2d 1343, 28 Pa. Commw. 531, 539 (Pa. Commw. Ct. 1977).

the Board shall be entitled to draw an adverse inference from Amedson's silence. The Board imposing further sanctions on his professional license and/or monetary fines under such evidentiary and testimonial prohibitions is a violation of Amedson's Eighth and Fourteenth Amendment rights and privileges and constitutes a violation of his civil rights.

18. Paragraph 3.15. HHS SA J. Timothy Hinckley is a crucial government witness and personally was present during many of the meetings and events with Amedson, including the alleged occurrences on March 16, 2006 and March 21, 2006. Amedson's counsel has in fact fully complied with the HHS Touhey regulations and provided substantiation to the HHS Inspector General as to the reasons why Hinckley must be allowed to testify.[14] The federal government's refusal to provide Hinckley for deposition and testimony at the hearing substantially interferes with and prejudices Amedson's presentment of the facts in his defense. Moreover, admitting Hinckley's statements by way of the Prosecutor's Declaration is a clear violation of not only the HHS Touhey regulations, but is a clear violation of Amedson's Sixth and Fourteenth Amendment rights and privileges by allowing hearsay testimony from a key fact witness in a quasi-criminal action where the

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[14] See Amedson's Exhibit 8 which references counsel's specific Touhey request made to the HHS Inspector General in accordance with law. Counsel has subsequently followed that initial Subpoena request with an additional Touhey request for the federal government to provide Hinckley to testify at the hearing. Counsel has in fact fully complied with the HHS Touhey regulations.

Defendant is denied the right to access and interview such witness. If Hinckley is unavailable to Amedson, Hinckley must be held unavailable to the prosecution to present any testimony by way of any written and/or oral statements inserted into the record over Amedson's objections. The government tells Amedson that his recourse is to follow the Touhey regulations and seek enforcement in court. If such is the course that Amedson must follow to obtain Hinckley's availability as a witness, then so must the same course have been followed by the Department seeking to enforce its Subpoena against Amedson. It is a clear violation of constitutional principles of due process and substantial justice and fair play, as well as the Fifth Amendment, for the Presiding Officer on the one hand to tell Amedson, 'too bad, you must follow the course of action laid out in the law to obtain Hinckley's testimony,' while on the other hand excusing the Department's abject failure to seek its sole and legal means of enforcing its Subpoena in a court of law and instead imposing substantial and severely prejudicial evidence and testimonial sanctions upon Amedson in violation of the law.

19. Paragraph 3.16. Same grounds as set forth in #18 above. Testimony of Hinckley at the hearing is not discovery, it is the presentation of competent, relevant and admissible evidence necessary to the defense of Amedson regarding issues of credibility and involuntariness of alleged oral and written statements. Because the federal government is substantially and materially interfering with the presentation of Amedson's defense in this quasi-criminal action, the proper remedy is to expunge from

the record those statements in e-mails attributed to Hinckley and as to which the Presiding Officer has previously overruled Amedson's objections to their admissibility and allowed them into the record albeit appended to the Prosecutor's Declaration. See underlying and related motions and briefs, including reconsideration, as to Orders referenced in Paragraph 2.5.

20. Paragraph 3.20. On the same grounds as set forth in Amedson's Prehearing Memorandum and recounted in whole or in part in Paragraph 3.19 of Prehearing Order No. 10, Amedson renews his objections to each of the Department's Exhibit Nos. 1 - 4, inclusive. See also Amedson's underlying motions and briefs, including reconsideration, related to and regarding the referenced Order.

21. Paragraph 3.23. Amedson objects to the exclusion of his Exhibit Nos. 1, 2, 3 and 8. These documents are relevant to the issues of Amedson's credibility and Whistleblower status; anonymity and the need for a protective order against disclosure of this action's records and materials as public records; immunity and proof of Amedson's extensive cooperation with federal and State investigators in the A-Z Pharmacy investigation in compliance with terms of the immunity agreement; and the rejection of counsel's Touhey request to secure the testimony of Hinckley as setting the foundation for the presentment of alternative evidence as to Hinckley's investigative relationship with Amedson, express grant of federal immunity to support Amedson's credibility, and involuntariness of certain alleged oral and written statements now sought to be used by the Prosecutor

against Amedson. The exclusion of these Exhibits substantially prejudices Amedson to his material detriment in this action, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial bar omitting issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious. There is no danger of confusion with the Board, as it has the authority to query witnesses and is the proper and only decision-making body to assess weight to the evidence. These Exhibits are relevant and admissible and the only question goes to their weight. See also Amedson's underlying motions and briefs, including reconsideration, related to and regarding the referenced Order.

22. Paragraph 3.25. Amedson objects to the exclusion of his Exhibit No. 5. This Exhibit was obtained in answer to a Subpoena Duces Tecum issued to DSHS employee Troy Parks which establishes its foundation and is relevant to demonstrate Amedson's Whistleblower status and early and extensive cooperation with State investigative personnel in the A-Z Pharmacy matter, which is at the heart of this

entire illegal action taken by the Board against Amedson in violation of his immunity and in violation of his constitutional rights and privileges. This evidence is relevant to the previous hearsay allegations by Hinckley that Amedson was uncooperative in investigative efforts. The exclusion of this Exhibit substantially prejudices Amedson to his material detriment in this action, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial bar omitting issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious. There is no danger of confusion with the Board, as it has the authority to query witnesses and is the proper and only decision-making body to assess weight to the evidence. This Exhibit is relevant and admissible and the only question goes to its weight.

23. Paragraph 3.26. Amedson objects to the exclusion of his Exhibit No. 6. This Exhibit was sent to Hinckley with a copy to Amedson which establishes the foundation and is relevant to demonstrate the extent of the federal government's involvement in rehabilitating any undermining as to Amedson's

credibility and also the forgiveness by Lilly as to any alleged acts or conduct by Amedson. This evidence is relevant to the previous hearsay allegations by Hinckley that Amedson was uncooperative in investigative efforts and that it was unknown to Hinckley as to the reasons underlying the Lilly letter.[15] The exclusion of this Exhibit substantially prejudices Amedson to his material detriment in this action, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial bar omitting issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious. There is no danger of confusion with the Board, as it has the authority to query witnesses and is the proper and only decision-making body to assess weight to the evidence. This Exhibit is relevant and admissible and the only question goes to its weight.

24. Paragraph 3.29. Amedson objects to the exclusion of prehearing motions and briefs from the record provided to the Board at the hearing. Other

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[15] This is quite remarkable as Hinckley himself was the driving force behind obtaining this letter from Lilly.

than constitutional issues which are fundamental and central to this quasi-criminal action, the Board is the ultimate fact finder and decision-maker. Unless the prehearing record of motions and appended documentation is provided to the Board as part of the hearing record, the Board is deprived of material evidence which it must consider in its decision-making process. In addition, the prehearing record of motions and appended documentation contains substantial and competent evidence as to Amedson's defenses in this action.[16] With the unlawful evidence and testimonial sanctions imposed upon Amedson stemming from the reasonable and well-founded assertion and invocation of his constitutional rights and privileges as Defendant in this quasi-criminal action, the prehearing motions very likely comprise the only competent substantial evidence supporting Amedson's defense as to the Statement of Charges. The withholding of such material and relevant evidence from the Board prejudices Amedson to his material detriment in this action, is in violation of constitutional provisions on its face or as applied, is outside the statutory authority or jurisdiction of the agency as conferred by any provision of law, is based on unlawful procedure or decision-making process, is based on failure to follow prescribed procedures as to decision-making and

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[16] Declarations were provided as required support of motions to suppress and dismiss and were offered without waiving or relinquishing Amedson's Fifth Amendment rights and privileges. Alternative means of discovery were offered to the Department consisting of answering written interrogatories in lieu of compulsory oral interrogation by the Prosecutor against the Defendant in a quasi-criminal action.

application of constitutional and statutory principles, is based on an erroneous interpretation or application of the law, is not supported by competent substantial evidence, is a material and prejudicial bar omitting issues required to be resolved by the Board as ultimate fact finder and decision-maker in this action, is inconsistent with applicable agency rules and/or relevant statutes, and/or is arbitrary and capricious.

25. Paragraph 3.30. In addition to his demand for the dismissal of the Statement of Charges against him, Amedson has also demanded relief in the form of statutory monetary damages under RCW 4.24.510. See First Amended Answer to Statement of Charges.

III. REQUEST FOR DISQUALIFICATION OF BOARD MEMBER

Pursuant to WAC 246-11-480(6) and RCW 34.05.425(3) and fundamental principles of due process, fairness and substantial justice, Amedson respectfully requests that (former) Board Member Susan Boyer be disqualified from in any way or manner participating in the hearing, discussions and the decision-making process of this action. Although Ms. Boyer is still listed on the active roster of Board of Pharmacy Members, she has served two terms on the Board and the expiration date of her second term was January 19, 2008. Pursuant to RCW 18.64.001, a member may serve only two - four year terms with no opportunity for extension or reappointment. If a vacancy now exists due to expiration of Ms. Boyer's second term, then Governor Gregoire must appoint a

new member to the Board. In addition, several years ago when Amedson was employed by Tacoma General Hospital, Ms. Boyer terminated his employment as a Pharmacist and such action resulted in litigation and a settlement. On grounds of appearance of fairness, bias and prejudice, as well as simply based on the fact that her term on the Board has come to an end as a matter of law, Amedson respectfully moves that Ms. Boyer be disqualified from any participation whatsoever in the Board's action against him.

IV. NOTICE OF NONATTENDANCE AT HEARING IN PROTEST

Respectfully, Amedson in good faith and in good conscience cannot and will not attend the hearing scheduled for March 7, 2008 as protest to the unconscionable imposition of evidence and testimonial sanctions against him by the Presiding Officer under Prehearing Order No. 10. Amedson has presented his case in full in his prehearing motions and briefs, including reconsideration, and has in good faith participated in these proceedings while steadfastly asserting and invoking his constitutional rights and privileges, including and not limited to his Fifth Amendment privilege against self-incrimination and right to remain silent with any adverse inferences being drawn or implied therefrom. The Department has failed to exhaust its statutory remedy regarding enforcement of Subpoenas and the Presiding Officer has made an end run around such remedy by imposing substantial and severe evidence and testimonial sanctions against Amedson notwithstanding Amedson's

offer to appropriately answer reasonable written interrogatories. These sanctions severely prejudice Amedson and hamstring his ability to participate in any meaningful manner when taken in conjunction with the other evidentiary rulings made by the Presiding Officer in Prehearing Order No. 10 and the subject of Amedson's objections as set out in the foregoing. Amedson moves the Presiding Officer reconsider his rulings announced in Prehearing Order No. 10 consistent with the above objections and (1) remove all evidentiary and testimonial sanctions against Amedson, and (2) recognize in full and in all respects Amedson's constitutional rights and privileges, including his Fifth Amendment rights and privileges afforded him as the Defendant in this quasi-criminal action.

Under the special and unique facts and circumstances of this case, and fundamentally on grounds that the administrative imposition of evidence and testimonial sanctions against Amedson under Prehearing Order No. 10 is not a lawful remedy or sanction as the Department has failed to exhaust its sole and statutory remedy of enforcing its administrative Subpoena in the courts, Amedson contends that any hearing conducted under such unlawful constraints is but a *pro forma* proceeding of no substantive legal effect. Under the evidence and testimonial constraints imposed by Prehearing Order No. 10 and the violation of Amedson's constitutional rights and privileges as Defendant in this quasi-criminal action, the hearing cannot be conducted as scheduled nor should any default against Amedson be entertained or entered unless and until these

fundamental issues regarding enforcement of the Department's Subpoena are presented to and resolved by the courts, as only the courts have the authority to enforce an administrative Subpoena. RCW 34.05.588 (1).

By taking this action of not attending the hearing, Amedson means and intends no disrespect to the Board Members or to the Presiding Officer. Amedson takes this action reasonably and solely in respect and support of the Constitutions of the United States and the State of Washington as protest to the unfair, excessive and unconstitutional constraints placed upon him in this action.[17] However, should the Presiding Officer grant Amedson's motion for reconsideration as requested and remove all constraints and fully recognize all his constitutional rights and privileges as Defendant in this quasi-criminal action, Amedson will attend the hearing and present his case for determination by the Board.

DATED this 28th day of February, 2008.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.
s/ Rhys A. Sterling
Rhys A. Sterling, WSBA #13846
Attorney for Respondent/Defendant
Joseph R. Amedson

[17] Peaceful acts of protest in support of civil rights and the recognition thereof are fundamental to and foundational aspects of the American experience.

APPENDIX P

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

JOSEPH R. AMEDSON, individually and with respect to his licensure as a Pharmacist, No. PH00011607 Petitioner, v. WASHINGTON STATE BOARD OF PHARMACY, a Board as established by law under RCW 18.64.001; WASHINGTON STATE DEPARTMENT OF HEALTH, an administrative agency of the State of Washington; ADJUDICATIVE SERVICE UNIT, a unit of the Washington State Department of Health; and ARTHUR E. DeBUSSCHERE, Health Law Judge, Presiding Officer, Adjudicative Service Unit, Department of Health, Respondents.	No. 08-2-01147-7 PETITION FOR JUDICIAL REVIEW OF FINAL ORDER AS TO LICENSE REVOCATION AS A PHARMACIST BY BOARD OF PHARMACY, AND PREHEARING ORDERS ISSUED BY PRESIDING OFFICER

Pursuant to WAC 246-11-600 and RCW 34.05.510 et seq., JOSEPH R. AMEDSON ("Amedson"), individually and with respect to his licensure as a Pharmacist, Credential No. PH00011607, hereby files this Petition for Review in the Superior Court for Thurston County seeking judicial review of (1) the **FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER** (Failure to Appear) revoking Amedson's professional license and credential as a Pharmacist entered in an adjudicative proceeding by the State BOARD OF PHARMACY ("Board of Pharmacy"), and (2) **PREHEARING ORDER Nos. 2, 4, 5, 6, 7, 8, 9, and 10** entered by Arthur E. DeBusschere, Presiding Officer, and related motions thereto, including reconsideration, filed by Amedson.

I. IDENTITY OF PETITIONER

Petitioner is Joseph R. Amedson, an individual that has been professionally licensed by the State of Washington as a Pharmacist since 1983 under Credential No. PH00011607. Amedson's mailing address is 22522 S.E. 51st Street, Issaquah, Washington 98029.

II. PETITIONER'S ATTORNEY

Petitioner's attorney is Rhys A. Sterling, WSBA #13846. Mr. Sterling's mailing address is Rhys A. Sterling, P.E., J.D., Attorney at Law, P.O. Box 218, Hobart, Washington 98025-0218. Office telephone number is 425-432-9348 and fax number is 425-413-2455.

III. IDENTITY OF STATE AGENCY

The principal State Agency whose action is at issue is the Washington State Board of Pharmacy. The Board of Pharmacy is a State Board established under RCW 18.64.001. The Board's jurisdiction and disciplinary authority as to licensed pharmacists are generally found in and pursuant to Chapter 18.64 RCW and Chapter 18.130 RCW.

The prosecuting agency in this quasi-criminal professional license disciplinary action is the Department of Health, c/o Mary Selecky, Secretary of Health, 101 Israel Road S.E., Tumwater, WA 98501. The Adjudicative Service Unit is a unit of the Department of Health having responsibility for the conduct of professional license disciplinary actions, and the Presiding Officer is a Health Law Judge in the staff of the Adjudicative Service Unit. The Adjudicative Service Unit is responsible for docketing, service of orders, and maintaining custody of the adjudicative proceeding record and is located at 310 Israel Road, Tumwater, WA 98501.

IV. AGENCY ACTIONS AT ISSUE

Following are the agency actions taken by the Board of Pharmacy and the Presiding Officer in the adjudicative proceeding captioned In the Matter of Joseph R. Amedson, R.Ph., License No. PH00011607, Docket No. 07-04-A-1080PH, Master Case No. M2007-73807, which are at issue herein:

1. **Findings of Fact, Conclusions of Law and Final Order (Failure to Appear)** dated April 26, 2008 served by first class mail on April 30, 2008 ("Final Order"). Because a Protective Order for Confidentiality regarding the file was issued by the Presiding Officer in this case, see Prehearing Order No. 11 dated April 28, 2008, a copy of the Final Order is not appended hereto. A summary of the Final Order is set forth in the following section of this Petition for Judicial Review as permitted by RCW 34.05.546 (4). Pursuant to GR 15(c), Amedson will move this Court to issue an Order to seal the case file in this judicial proceeding to continue the Protective Order for Confidentiality issued by the Presiding Officer in this case (thus, this Petition is necessarily general).
2. **Prehearing Order Nos. 2, 4, 5, 6, 7, 8, 9, and 10** entered by Arthur E. DeBusschere, Presiding Officer, in response to and as contested by related motions thereto, including reconsideration, filed by Amedson.

V. SUMMARY OF FINAL ORDER AND SCOPE OF APPEAL

The Final Order issued by the Board of Pharmacy (1) revokes Amedson's license to practice as a pharmacist in the State of Washington; (2) prohibits

Amedson from reapplying or reinstatement of his license to practice as a pharmacist for at least twenty (20) years from the date the Final Order was signed; and (3) would require Amedson to comply with the requirements existing for applicants at the time of his application (in the year 2028).

Amedson takes issue with, contests, challenges and appeals the following aspects and elements of the Final Order:

A. **Preamble**, as there is no recounting of the grounds for Amedson not appearing at the hearing; default and proceeding with the hearing *in absentia* is an extreme and unlawful remedy under the circumstances of this case; Amedson's prehearing motions and evidence were not presented to the Board for consideration at the hearing and the Department would not have met the clear, cogent and convincing standard of proof if such prehearing evidence had been considered; and license revocation with no opportunity to reapply for at least 20 years is an unlawful and unconstitutional extreme and excessive penal sanction imposed under all the relevant and substantial facts and circumstances of this case.

B. **Issues**, as those issues identified by Amedson in his Prehearing Memorandum (included herein by reference) were improperly and illegally rejected and denied by the Presiding Officer and never considered by the Board, and as preserved by Amedson in his response and objection to Prehearing Order No. 10 and motion for reconsideration (included herein by reference). It is further stated that Amedson "planned to argue in his defense (1) that [he] was granted immunity; and (2) the evidence should be

suppressed, because it was gathered from his involuntary state-ments." However, what is missing from this statement is the summary suppression of all such defense evidence and testimony imposed on Amedson as a sanction by the Presiding Officer in Prehearing Order No. 10. The Board was unfairly and improperly given only part of the facts for its consideration, and was purposely denied access to all relevant facts in this case.

C. **Summary of Proceedings**, as finding Amedson in default for his "failure to appear" was unlawful and improper under all the circumstances and an abuse of discretion and unconstitutional, as Amedson in good faith well in advance of the scheduled hearing gave written notice of his intent not to appear unless the Presiding Officer reconsidered his Prehearing Order No. 10 and removed the evidence and testimonial sanctions imposed on Amedson as a penalty for asserting his constitutional and statutory rights and privileges in this quasi-criminal case against him as the Defendant. Amedson objects to and appeals the admission of Department Exhibit Nos. 1, 2, 3, and 4; and he objects to and appeals the exclusion of his previously offered Exhibit Nos. 1, 2, 3, 5, 6, and 8.

D. **Findings of Fact**. Amedson contests, challenges and appeals each of the following Findings of Fact in their entirety:

Paragraphs 1.2; 1.3; 1.4; 1.5; 1.6; 1.7; 1.8; 1.9; 1.10; and 1.11.

E. **Conclusions of Law**. Amedson contests, challenges and appeals each of the following Conclusions of Law in their entirety:

Paragraphs 2.1; 2.3; 2.5; 2.6; 2.7; and 2.8 (all parts through the end of the Conclusions of Law section).

F. **Order**. Amedson contests, challenges and appeals each of the following parts of the Order in their entirety:

Paragraphs 3.1; 3.2; and 3.3. Furthermore, Amedson contends that the Final Order based on a default (failure to appear) is substantively and fatally defective for failure of the Final Order to include a specific and mandatory written Finding of Fact "that there is no reason to believe that [Amedson] is in active military service." WAC 246-11-280(4)(c).

VI. PREHEARING ORDERS SUBJECT TO THIS JUDICIAL REVIEW

In addition to the judicial review of the Final Order and within the scope of this Petition for Judicial Review, as specifically and expressly identified, set forth and preserved for judicial review in Amedson's response and objections to, and motion for reconsideration of, Prehearing Order No. 10 that defined the conduct of the scheduled hearing, and including Prehearing Order Nos. 2, 4, 5, 6, 7, 8, and 9, each of these Prehearing Orders is contested, challenged and appealed under this Petition for Judicial Review and are to be separately, collectively and independently reviewed and appropriately ruled upon by this Court in light of and, as appropriate, on the constitutional, statutory and other grounds and for the reasons set forth respectively therein of each of the following prehearing *papers*, *pleadings*, and **Motions** made by

Amedson, which comprise Amedson's administrative record on review:

1. Amedson's **Motion To Quash Department's Notice Of Deposition And Subpoena Duces Tecum, And For Entry Of Protective Order**, and any attachments/Declarations attached thereto, filed and served by mail on November 5, 2007.

2. Amedson's **Motion In Limine to Suppress Oral and Written Statements And to Exclude All Resulting Fruit of the Poisonous Tree**, and any attachments/Declarations attached thereto, filed and served by mail on November 15, 2007.

3. Amedson's *First Amended Answer To Statement Of Charges, And Request For Adjudicative Proceeding And Formal Hearing*, and any attachments /Declarations attached thereto, filed and served by mail on November 16, 2007.

4. Amedson's **Reply to Department's Response and Objection to Motion to Quash**, and any attachments/Declarations attached thereto, filed and served by mail on November 20, 2007.

5. Amedson's *Exhibit List And Answer To Subpoena Duces Tecum*, and any attachments/ Declarations attached thereto, filed and served by mail on November 27, 2007.

6. Amedson's **Motion For Reconsideration Of Prehearing Order No. 2 Denying Motion To Quash**, and any attachments/Declarations attached thereto, filed and served by mail on November 29, 2007.

7. Amedson's **Reply Brief On Motion In Limine To Suppress And Motion To Strike And Motion To Compel**, and any attachments/Declara-

tions attached thereto, filed and served by mail on December 8, 2007.

8. Amedson's **Response To Department's Motion For Sanctions**, and any attachments/Declarations attached thereto, filed and served by mail on December 10, 2007.

9. Amedson's **Motion To Dismiss With Prejudice the Board's Statement of Charges on Grounds of Immunity**, and any attachments/Declarations attached thereto, filed and served by mail on December 17, 2007.

10. Amedson's **Reply Brief on Motion to Dismiss And Motion to Strike**, and any attachments/Declarations attached thereto, filed and served by mail on December 28, 2007.

11. Amedson's *letter of intent to file a Motion for Reconsideration of Prehearing Order No. 5: Order On Respondent's Motion To Suppress (dated January 2, 2008* and received by mail on January 4, 2008) promptly following the issuance of/compliance regarding the Presiding Officer's ruling on his Motion to Compel (see Prehearing Order No. 5, at Page 8, ¶ 3.12, and at Page 9, ¶ 5.3), and any attachments/Declarations attached thereto, filed and served by mail on January 4, 2008.

12. Amedson's **Reply to Department's Response to Motion to Compel**, and any attachments/Declarations attached thereto, filed and served by mail on January 10, 2008.

13. Amedson's **Motion for Reconsideration of Prehearing Order No. 6: Order on Department's Motion for Sanctions**, and any attachments/Declarations attached thereto, filed and served by mail

on January 14, 2008.

14. Amedson's **Reply to Department Response to Motion for Reconsideration of Prehearing Order No. 6 Re: Sanctions And Motion to Quash**, and any attachments/Declarations attached thereto, filed and served by mail on January 23, 2008.

15. Amedson's **Motion for Reconsideration of Prehearing Order No. 7 Re: Denial of Motion to Dismiss And Clarification of Motion for Confidentiality**, and any attachments/Declarations attached thereto, filed and served by mail on January 30, 2008.

16. Amedson's *Prehearing Memorandum*, and any attachments/Declarations attached thereto, filed and served by mail on February 4, 2008.

17. Amedson's **Motion for Reconsideration of Prehearing Order No. 5 re: Denial of Motion to Suppress And Prehearing Order No. 8 re: Denial of Motion to Compel**, and any attachments/Declarations attached thereto, filed and served by mail on February 6, 2008.

18. Amedson's **Response To Department's Motion For Sanctions Set Forth In Its Prehearing Memorandum**, and any attachments/Declara-tions attached thereto, filed and served by mail on February 7, 2008.

19. Amedson's **Response And Objection To And Motion For Reconsideration Of Prehearing Order No. 10 AND Notice Of Intent Not To Attend Hearing As Protest To Constraints Under Pre-hearing Order No. 10**, and any attachments/Declara-tions attached thereto, filed and served by mail on February 28, 2008.

VII. IDENTIFICATION OF PARTIES IN ADJUDICATIVE PROCEEDING

The only individual that was a party to the adjudicative proceeding leading to the above-described agency actions was Joseph R. Amedson, the Petitioner herein.

The only agencies involved in the underlying adjudicative proceeding were the Washington State Board of Pharmacy and Department of Health. The only other individual substantively involved in the underlying actions was the Presiding Officer.

VIII. PETITIONER'S STANDING

This is a quasi-criminal professional license disciplinary proceeding undertaken by the Washington State Board of Pharmacy and the Department of Health against Joseph R. Amedson. Amedson asserts that his State and federal constitutional and statutory rights and privileges have been violated by these agencies and the Presiding Officer, including and not limited to U. S. Const. amend. V and Wash. Const. art. I, § 9 regarding the privilege against self-incrimination and right to remain silent in this quasi-criminal action against him as the Defendant. Stemming from these asserted violations of constitutional and statutory rights and privileges, the Presiding Officer issued Prehearing Order No. 10 that prohibited Amedson from effectively participating and presenting defenses and evidence as the Defendant in the hearing conducted as part of the adjudicative proceeding in this case. Because of such illegal constraints imposed

upon Amedson, Amedson respectfully and in good faith declined to attend the scheduled hearing unless the Presiding Officer reconsidered Prehearing Order No. 10 and lifted the evidence and testimonial sanctions against Amedson. The Presiding Officer did not respond to Amedson's request for reconsideration of sanctions and proceeded with declaring Amedson in default for failure to attend the hearing. As a result of this default proceeding and hearing conducted in the absence of Amedson and subject to the evidence and testimonial sanctions against Amedson as the Defendant in this quasi-criminal action, the Board of Pharmacy revoked Amedson's license to practice as a pharmacist in the State of Washington and further prohibited Amedson from reapplying for a pharmacist license for at least twenty (20) years.

Amedson is both aggrieved and adversely affected by the decision of the Board of Pharmacy revoking his professional license and credential as a Pharmacist. Because of Amedson's advancing age, the Board of Pharmacy effectively imposed the administrative death sentence and penalty on Amedson and his ability to practice his profession as a Pharmacist, his professional livelihood and his professional and personal reputation. Accordingly, Amedson has standing to seek judicial review of the Board of Pharmacy's action revoking his license as a Pharmacist. See RCW 34.05.530.

IX. REQUEST FOR DIRECT REVIEW BY COURT OF APPEALS

Pursuant to and in accordance with RCW

34.05.518(1), Amedson will make an application to the Thurston County Superior Court to certify this case directly to the Court of Appeals, Division II, on grounds that (1) there are fundamental and urgent issues regarding the constitutional rights and privileges of the named defendant under U.S. Const. amend. V and Wash. Const. art. I, § 9, in quasi-criminal professional license disciplinary actions which require prompt and final determination; (2) Amedson has been given the administrative death sentence and penalty in a default proceeding in violation of his constitutional rights and privileges, and by the use of tainted evidence obtained and used against him in violation of statutory requirements and immunity provisions by agreement and under law, and prolonged delays are substantially and severely detrimental to him, his professional livelihood and reputation; (3) an appeal to the court of appeals would be likely regardless of the determination in superior court; and (4) the appellate court's determination in this case will have significant precedential value to Amedson and all other holders of professional licenses in the State of Washington.

X. REASONS FOR GRANTING RELIEF

Amedson seeks review of the Final Order and Prehearing Order Nos. 2, 4, 5, 6, 7, 8, 9, and 10 entered in this quasi-criminal professional license disciplinary action against him as Defendant because the Board of Pharmacy and Presiding Officer DeBusschere:

1. Have issued prehearing and final orders that

are in violation of constitutional provisions on their face or as applied. RCW 34.05.570(3)(a).

2. Have issued prehearing and final orders that are outside the statutory authority or jurisdiction of the agency conferred by any provision of law. RCW 34.05.570(3)(b).

3. Have engaged in unlawful procedure or decision-making process, or have failed to follow a prescribed procedure. RCW 34.05.570(3)(c).

4. Have erroneously interpreted or applied the law. RCW 34. 05.570(3)(d).

5. Have issued prehearing and final orders not supported by competent, admissible and relevant evidence that is substantial when viewed in light of the whole record before the Court, which includes the agency record for judicial review. RCW 34.05.570(3)(e).

6. Have not decided all issues requiring resolution by the agency. RCW 34.05.570(3)(f).

7. Have issued prehearing and final orders that are inconsistent with the rules of the agency. RCW 34.05.570(3)(h).

8. Have issued prehearing and final orders that are arbitrary and capricious. RCW 34.05.570 (3)(i).

Amedson believes that relief in this case should be granted on the above-stated grounds and as hereinbelow requested because (a) this Board disciplinary action *in toto* and evidence allegedly secured from and then used against him were done so in violation of an express albeit oral grant of immunity by the Board's investigative agent that was relied upon by Amedson all to his detriment and severe injury and as to which he fully complied with his obligations until the State's breach occurred; (b) Amedson did not knowingly,

intelligently and voluntarily waive any of his State and federal constitutional rights and privileges in this quasi-criminal professional license disciplinary action against him as Defendant, including and not limited to his privilege against self-incrimination and right to remain silent pursuant to U.S. Const. amend. V and Wash. Const. art. I, § 9; (c) prior to obtaining the purported written statement (used as a confession or admission against interest) from him, Amedson was never informed either orally or in writing, as is mandated by statute in RCW 18.130.095 (2)(a), the nature of the Board investigation as to which he was the target/subject that could result in a disciplinary action and a Statement of Charges being brought against him and his professional license as a Pharmacist; (d) compulsory oral interrogation via oral deposition by the Prosecuting Attorney violated his State and federal constitutional right to remain silent and privilege against self-incrimination as the Defendant in a quasi-criminal action, and the Order compelling Amedson to submit to such compulsory oral interrogation clearly violated his fundamental and most valuable State and federal constitutional rights and privileges; (e) evidence and testimonial sanctions imposed by the Presiding Officer against Amedson stemming from his good faith invocation of his State and federal constitutional rights and privileges were unlawful and inappropriate under the circumstances and prohibited Amedson from effectively participating in and presenting any defense as to immunity, suppression of evidence, and involuntariness at the scheduled hearing; (f) the Department and Prosecuting Attorney failed to exhaust their administrative/judicial

remedies under RCW 34.05.588(1) regarding enforcement of an agency subpoena and Amedson's refusal to submit to oral deposition as the Defendant in this quasi-criminal action prior to the Presiding Officer imposing the draconian evidence and testimonial sanctions against Amedson in Prehearing Order No. 10, notwithstanding the summary rejection of the Department and Presiding Officer as to Amedson's longstanding offer to, without waiving any of his constitutional rights and privileges, appropriately respond in writing to a reasonable number of written interrogatories on any relevant issue in this case; (g) the Presiding Officer improperly overruled Amedson's objections to the Department's Exhibits while sustaining most of the Department's objections to Amedson's Exhibits thus rendering relevant documentary evidence in large and valuable part inadmissible; (h) the Presiding Officer reduced and minimized Amedson's fundamental and most valuable constitutional rights and privileges under the Fifth Amendment as Defendant in this quasi-criminal action to a level par with that of a mere witness or party in a generic civil case for damages, notwithstanding well-established legal precedents and persuasive authority applicable to quasi-criminal professional license disciplinary actions, the Presiding Officer's relevant findings and conclusions of law regarding the quasi-criminal nature of this action and the applicability of the Fifth Amendment in such proceedings, and contrary to the Board's own rules to "resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, stat-

utes, rules, and court decisions." WAC 246-11-480(3)(b); (i) the Presiding Officer abused his discretion and failed to adhere to well-established legal principles by refusing to properly consider Amedson's motions for reconsideration presented in accordance with the applicable rules for such motions; (j) the Presiding Officer abused his authority and improperly limited the issues for the hearing;[1] (k) the Presiding Officer denied Amedson those rights and protections afforded under and pursuant to RCW 4.24.510 that would have accorded him a "safe harbor" and statutory immunity from the Board disciplinary action against him; (l) rejected that reasonably asserting in good faith one's constitutional and statutory rights and privileges as grounds for noncompliance with an invalid Order is not as a matter of law willful interference with the

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[1] The issues presented by Amedson in his Prehearing Memorandum for determination by the Board were: (1) whether this quasi-criminal professional license disciplinary action against Amedson as the Defendant must be dismissed on grounds of immunity given to Amedson from such action?; (2) whether proffered evidence by the Department must be suppressed or otherwise limited as obtained involuntarily under grant of immunity, and any reference to or use thereof violates Amedson's constitutional rights and privileges and is a breach of immunity?; (3) whether any alleged oral and/or written confession, admission or statement purported by Amedson was involuntary under grant of immunity, or otherwise invalid and inadmissible by failure of the Board investigator(s) and/or others to fully comply with the mandatory written notice requirements of RCW 18.130.095(2)(a), or otherwise obtained in violation of due process or any other constitutional rights and privileges that were not voluntarily, knowingly and intelligently waived or relinquished by Amedson?; (4) whether any remaining and competent evidence proves under the clear, cogent and convincing standard that it is highly probable that Amedson is guilty of unprofessional conduct?; and (5) if Amedson is found guilty of unprofessional conduct, what is the appropriate and just punishment to be imposed under law by the Board?

progress of this proceeding or the willful refusal to obey an Order as wrongly found and concluded by the Presiding Officer; (m) the Presiding Officer finding and concluding in Prehearing Order No. 10 that Amedson's constitutionally-protected silence or refusal to submit to any direct examination in the Department's case-in-chief and/or cross-examination outside the scope of any limited direct testimony offered as to the issues of immunity and involuntariness could be used against him by the Department at the hearing; and (n) erroneously used in this action evidence presented in violation of the applicable Touhey regulations. All of the foregoing substantial and well-grounded and founded reasons have been set forth in detail in Amedson's prehearing motions and pleadings. Amedson believes that this Court will duly consider such motions and grant the relief requested by Amedson in his prehearing motions.

XI. REQUEST FOR RELIEF

Amedson respectfully asks the Court to grant him the following relief:

1. Enter a decree vacating the Final Order entered by the Board of Pharmacy, and Order Amedson's Pharmacist license immediately reinstated by the Board;
2. Enter a decree vacating and voiding Prehearing Order Nos. 2, 4, 5, 6, 7, 8, 9, and 10;

3. Independently consider each of Amedson's prehearing motions under the appropriate and applicable rules of law and enter appropriate rulings and decisions thereon granting the specific or other relief requested as to each by Amedson, and remand this case to the Board for further proceedings, if any, consistent with such rulings and decisions;
4. Grant Amedson statutory monetary damages and reasonable attorney fees and costs pursuant to RCW 4.24.510; and
5. Such other and further relief that the Court deems just and proper in this matter pursuant to law and equity.

DATED this 14th day of May, 2008.

RHYS A. STERLING, P.E., J.D.

s/ Rhys A. Sterling
Rhys A. Sterling, WSBA #13846
Attorney for Petitioner Joseph R. Amedson

FILED
MAY 14 2008
Superior Court
Betty J. Gould
Thurston County Clerk

APPENDIX Q

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
BOARD OF PHARMACY

In the Matter of the Credential to to Practice as a Pharmacist of:	Docket No. 07-04-A-1080PH
JOSEPH R. AMEDSON, R.Ph., Credential No. PH00011607, Respondent	RESPONDENT AMEDSON'S MOTION FOR RECONSIDERATION OF PREHEARING ORDER NO. 2: ORDER DENYING MOTION TO QUASH

Under and pursuant to general principles of law and substantial justice, Amedson respectfully moves the Presiding Officer to reconsider Prehearing Order No. 2 Order Denying Motion To Quash entered in this action on November 28, 2007.

Reconsideration is appropriate under circumstances "where the court has obviously misapprehended a party's position or the facts or the law."[1] A party is entitled to reconsideration where the

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[1] Anderson v. United Auto Workers, 738 F. Supp. 441, 442 (D.Kan. 1990). Reconsideration is likewise appropriate to correct a clear error of law or fact or to prevent a manifest injustice. Bryan v. Shah, 351 F. Supp. 2d 295, 297 (D.N.J. 2005).

court has overlooked controlling law or material facts.[2]

Here, the Presiding Officer concluded as matters of law that (1) "Washington courts have continued to hold that a disciplinary proceeding is quasi criminal in nature";[3] and (2) "Washington law acknowledges that the Fifth Amendment privilege against self-incrimination applies to a quasi-criminal proceeding."[4]

Notwithstanding these conclusions of law that are clearly applicable to this specific case at issue as a professional license disciplinary action against Amedson as a licensed Pharmacist, the Presiding Officer strayed from this focus on Amedson as the Defendant in a quasi-criminal action and instead based his Order denying Amedson's Motion to Quash and for Protective Order on the application of the Fifth Amendment to purely civil cases and the invocation of such privilege by a party thereto or a witness therein. The principal appellate decision upon which the Presiding Officer rested his Order was the civil case of King v. Olympic Pipe Line Company, 104 Wn. App. 338, 16 P.3d 45 (2000).

The specific issue presented in the Olympic Pipe Line case was "whether to stay civil proceedings to

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[2] Interfaith Community Organization v. Honeywell International, 215 F. Supp. 2d 482, 507 (D.N.J. 2002); Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000) ("To be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.")

[3] Conclusion 2.9.

[4] Conclusion 2.7.

protect a party's Fifth Amendment rights when parallel criminal proceedings are pending". The civil case in which the Court of Appeals gave its decision was for monetary damages stemming from personal injuries/ death and property damage allegedly suffered as a con-sequence of a pipe line breakage and spill. Ultimately the appellate court remanded this matter to the trial court with instructions to conduct further proceedings and inquiries.

Be that as it may, Olympic Pipe Line is clearly distinguishable from our particular case and is, therefore, totally inapposite as to the disposition of Amedson's specific Motion to Quash. This was the message given in Amedson's Reply Brief not to stray from that line of case law applicable to the invocation of Fifth Amendment rights by the named Defendant in quasi-criminal actions. However, the Presiding Officer did stray and erroneously based his Order on the application of the Fifth Amendment in the civil context to parties and/or witnesses in such actions. As the named Defendant in this quasi-criminal action, such misapplication of the civil law to this quasi-criminal action substantially and irreparably injures and destroys Amedson's constitutional rights and privileges, under both the Fifth Amendment and Wash. Const. art. I, § 9, as well as the prohibition against the Department being allowed to comment on and to draw adverse inferences from Amedson's right to remain silent and not be compelled to testify by deposition or otherwise. This is also contrary to the charge given the Presiding Officer that decisions be based on the "best legal authority and reasoning available". WAC 246-11-480(3)(b).

The Presiding Officer also misapprehended the reference to the United States v. Milman matter in federal court. There is no question that Amedson was given immunity in that case[5] notwithstanding the bold attempt by federal officials to now purportedly but nevertheless ineffectively reshape such grant. Although a matter of concern to be acknowledged, it was not and is not the fundamental reason that Amedson invokes his Fifth Amendment privilege against self-incrimination and right to remain silent in **THIS** quasi-criminal professional license disciplinary action.[6] It is **THIS** specific and particular quasi-criminal disciplinary action that is the basis and ground for, and gives rise to, the invocation of Amedson's constitutional rights and privileges. **These constitutional rights and privileges derive solely and exclusively from the fact and Conclusion of Law that this particular proceeding is a quasi-criminal action as to which the Fifth Amendment applies to the named Defendant/Respondent herein; to wit, Amedson.**

Regardless of and notwithstanding the Milman matter and whatever else the federal officials may or

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[5] The Department has not presented any competent whatsoever to dispute or refute Amedson's assertion as fact that he was and is granted full immunity in the A-Z Pharmacy matter.

[6] The Milman matter was presented as further background as to the A-Z Pharmacy investigation in which Amedson played a key role. The conflict for trial testimony in that case arose as a direct result of the fact that the Board of Pharmacy breached its grant of immunity to Amedson and brought its Statement of Charges against him, which quasi-criminal action independently gave rise to Amedson's Fifth Amendment rights and privileges.

may not do with respect to A-Z Pharmacy, Amedson has Fifth Amendment rights and privileges in **THIS** quasi-criminal professional license disciplinary action that have been wrongly and erroneously overlooked, misapprehended and denied by issuance of Prehearing Order No. 2 Order Denying Motion To Quash. Respectfully and in light of fundamentally important constitutional rights and privileges afforded named Defendants in quasi-criminal actions such as **THIS** disciplinary proceeding but are being denied contrary to established law, Amedson asks the Presiding Officer to reconsider Prehearing Order No. 2 Order Denying Motion To Quash and to vacate such Order and to grant him the relief he requested and deserves as a matter of law in his underlying Motion To Quash and for Protective Order.[7]

Furthermore, Amedson respectfully moves the Presiding Officer to accept and rule on this Motion for Reconsideration notwithstanding the fact that such will likely not be addressed until after the scheduled date for deposition of December 3, 2007, as the issues presented by the underlying Motion to Quash and this Motion for Reconsideration involve fundamentally

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[7] Amedson stands steadfast on his constitutional rights and privileges and, respectfully and in good faith, will not be compelled to testify by deposition, at the hearing, or in any other manner whatsoever. Amedson has in good faith offered alternative means for the Department to conduct appropriate discovery in this action and, while preserving his constitutional rights and privileges, has already filed and served his proposed Exhibit List. Amedson respectfully will not undertake or allow to be imposed upon him any pressure or force in whatever form to waive, relinquish or in any way or manner diminish his constitutional rights and privileges in this action. Amedson controls the assertion of his constitutional rights and will do so responsibly and in good faith.

important and irreplaceable constitutional principles. RCW 34.05.020.

DATED this 29th day of November, 2007.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.

s/ Rhys A. Sterling
Rhys A. Sterling, WSBA #13846
Attorney for Respondent Amedson